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# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 850

COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

[illegible] AND HUGHES SPALD, EXECUTORS OF THE ESTATE OF JACK T. [illegible], DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 2, 1945
CERTIORARI GRANTED OCTOBER 8, 1945

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1945

## No. 289

## MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

## TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX


| | Original | Print |
|---|---|---|
| Proceedings in U. S. C. C. A., Fifth Circuit | 1 | 1 |
| Stipulation as to printed record on appeal | 1 | 1 |
| Designation of portions of record to be printed | 3 | 2 |
| Record from D. C. U. S., Middle District of Georgia | 5 | 2 |
| Caption and appearances [omitted in printing] | 5 | 2 |
| Petition | 6 | 3 |
| Answer | 18 | 8 |
| Amendment to answer and order allowing same | 23 | 12 |
| Plaintiff's reply to defendant's amended answer | 25 | 14 |
| Defendant's motion to dismiss | 29 | 15 |
| Plaintiff's amendment to petition and order allowing same | 30 | 17 |
| Exhibit A—Trust instruments of June 15, 1925, and Aug. 29, 1934 | 35 | 20 |
| Exhibit B—Letter of Dec. 30, 1924 | 64 | 37 |
| Exhibits C and D—Letters of June 16, 1925 | 65 | 37 |
| Exhibits E to G—Letters of Aug. 28, 1934, Aug. 29, 1934, and Aug. 25, 1934 | 70 | 40 |
| Defendant's answer to plaintiff's amendment to petition | 74 | 42 |
| Stipulation as to decision | 75 | 43 |

| | Original | Print |
|---|---|---|
| Record from D. C. U. S., Middle District of Georgia—Continued. | | |
| Statement of evidence | 76 | 43 |
| Objections to evidence | 76 | 43 |
| Testimony of— | | |
| Erle Cocke | 76 | 43 |
| Lt. Comdr. U. E. Sibley | 81 | 46 |
| Chas. J. Bloch | 86 | 49 |
| Hughes Spalding | 88 | 50 |
| Dr. Jos. E. Hines | 185 | 104 |
| Documentary evidence | 194 | 109 |
| Stipulation as to documentary evidence | 197 | 111 |
| Motion to dismiss | 197 | 111 |
| Order denying defendant's motion to dismiss | 197 | 111 |
| Order denying defendant's motion for judgment | 198 | 112 |
| Opinion of court, Deaver, J. | 198 | 112 |
| Findings of fact and conclusions of law | 213 | 120 |
| Judgment | 219 | 124 |
| Notice of appeal | 221 | 125 |
| Designation of contents of record on appeal | 221 | 125 |
| Amendment to designation of contents of record on appeal | 222 | 126 |
| Order as to original documentary evidence | 224 | 127 |
| Clerk's certificate [omitted in printing] | 224 | 127 |
| Minute entry of argument and submission | 225 | 127 |
| Opinion, Waller, J. | 225 | 127 |
| Judgment | 234 | 136 |
| Clerk's certificate [omitted in printing] | 235 | 137 |
| Order allowing certiorari | 236 | 138 |

1 In United States Circuit Court of Appeals,
Fifth Circuit

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE, APPELLANT
*vs.*
TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED, APPELLEES

[File endorsement omitted.]

*Stipulation of the portions of the contents of the record on appeal to be printed.*

Filed Sept. 26, 1944

The parties hereto by their respective counsel hereby stipulate and agree that the entire record made in the court below, shall constitute the record on appeal to this Court; and that all portions of the contents of the record not printed may be referred to at the argument of this case and in the briefs of the parties by the designations accorded them at the trial in the court below.

It is further stipulated and agreed that only the following portions of the contents of the record on appeal shall be printed:

1. Bill of Complaint, with amendments and exhibits.
2 2. Answer, with amendment.
3. All motions made by the defendant.
4. Court's rulings on such motions made by the defendant.
5. Transcript of evidence without exhibits.
6. Trial Court's Findings of Fact, Conclusions of Law, Judgment, and Opinion.
7. Notice of Appeal.
8. Designation of the Contents of the Record on Appeal.
9. Designation of the Portion of the Contents of the Record on Appeal to be Printed.
10. Stipulation between the parties agreeing to the portions of the contents of the record on appeal to be printed.

T. HOYT DAVIS,
*United States Attorney,*
*Attorney for Appellant.*
CHARLES W. WALKER,
*Assistant United States Attorney,*
*Attorney for Appellant.*
SPALDING, SIBLEY & TROUTMAN,
By JOHN A. SIBLEY,
*Attorneys for Appellee.*

3 In United States Circuit Court of Appeals

[Title omitted.]
[Filed endorsement omitted.]

*Designation of the portions of the contents of the record on appeal to be printed*

Filed Sept. 26, 1944

The appellant by his attorneys—pursuant to Rule 23 (1)—hereby respectfully designates the following portions of the contents of the record on appeal to be printed:

1. Bill of Complaint, with amendments and exhibits.
2. Answer, with amendments.
3. All motions made by the defendant.

4 4. Court's rulings thereon.

5. Transcript of evidence without exhibits.
6. Trial Court's Findings of Fact, Conclusions of Law, Judgment, and Opinion.
7. Notice of Appeal.
8. Designation of the Contents of the Record on Appeal.
9. This Designation of the Portion of the Contents of the Record on Appeal to be printed.
10. Stipulation between counsel designating portions of contents of record on appeal to be printed.

T. HOYT DAVIS,
*United States Attorney,*
*Attorney for Appellant.*

CHARLES W. WALKER,
*Assistant United States Attorney,*
*Attorney for Appellant.*

Service of a copy of appellant's foregoing Designated Portions of the Record on Appeal to be Printed in this cause is acknowledged, this 8th day of September 1944.

SPALDING, SIBLEY & TROUTMAN,
By JOHN A. SIBLEY,
*Counsel for Trust Company of Georgia, et al., as Executors of the Estate of Jack J. Spalding, deceased, Appellee.*

5 [Caption and appearances omitted.]

6 In the District Court of the United States for the Middle District of Georgia, Macon Division

TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED, PLAINTIFFS

*vs.*

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

[File endorsement omitted.]

*Petition*

Filed April 7, 1943

*To the District Court of the United States for the Middle District of Georgia, Macon Division:*

The petition of the Trust Company of Georgia, a corporation organized and existing under the laws of Georgia, and Hughes Spalding, a resident and citizen of the State of Georgia, as Executors of the Estate of Jack J. Spalding, deceased, plaintiffs, names Marion H. Allen, Collector of Internal Revenue, as defendant herein and respectfully shows to this honorable Court:

1. Jack J. Spalding died on December 8, 1938, a resident
7 of Fulton County, Georgia, leaving a will and naming Trust Company of Georgia and Hughes Spalding as Executors, who qualified as such on the 3rd day of January 1939.

2. Defendant is a citizen of the State of Georgia, and of the County of Baldwin, and is now and since July 1937, has been Collector of Internal Revenue of the United States for the District of Georgia, in which collection district the plaintiffs are residents and have their principal place of business.

3. This is a suit of a civil nature arising under the Internal Revenue laws of the United States. The defendant is indebted to the plaintiffs in the sum of Sixty-two Thousand Ninety-two Dollars and One Cent ($62,092.01) plus interest thereon at six (6%) per cent from July 24th, 1942, arising out of the facts hereinafter more fully stated.

4. Within the time required by law, plaintiffs as Executors of the Estate of Jack J. Spalding, deceased, filed with the Commissioner of Internal Revenue an Estate Tax Return for this estate and paid the tax.

5. Thereafter, and on or about June 8, 1942, the Commissioner of Internal Revenue asserted a deficiency in estate taxes in the sum of Sixty-six Thousand One Hundred Fourteen Dollars
8 and Twenty-two Cents ($66,114.22), with interest thereon from March 8, 1940.

Of this the sum of Fifty-four Thousand Three Hundred Ten Dollars and Five Cents ($54,310.05) principal, plus interest of Seven Thousand Seven Hundred Eighty-one Dollars and Ninety-Six Cents ($7,781.96) or a total of Sixty-two Thousand Ninety-two Dollars and One Cent ($62,092.01) was paid to the defendant pursuant to assessment and the balance of said assessment in the sum of Eleven Thousand Eight Hundred Four Dollars and Seventeen Cents ($11,840.17) principal, as permitted under the Revenue Act of 1926, was paid to the Department of Revenue of the State of Georgia.

6. The aforesaid deficiency resulted from the addition by the Commissioner of certain property to the gross estate of Jack J. Spalding, consisting of certain items of stocks and bonds included in two certain trusts under which The Citizens and Southern National Bank of Atlanta is now the acting trustee, created by Jack J. Spalding on June 15, 1925 for the benefit of his son, Jack J. Spalding, Jr., and his daughter, Susanne Spalding Schroder. Part of these assets was delivered by Jack J. Spalding to the trustee when the trusts were created and part was added to said trusts on August 29, 1934 by Jack J. Spalding. Said two instruments will be exhibited as often as may be required.

7. At the time the trust instruments of June 15, 1925 were executed, said Jack J. Spalding was a man of substantial property. At that time he made gifts of equal value to his three children. Said gifts represented only a small portion of his holdings. Said Spalding's purpose in making said gifts was to share his property in part with his children and to aid them in the maintenance, care and education of their respective families, and to carry out his often expressed purpose not to accumulate property exceeding a million dollars, and when his wealth equalled or exceeded that amount, to make additional distributions to his wife and children and to charitable objects.

He delivered outright to his eldest son, Hughes Spalding, who was then well established in the practice of law, the subject matter of the gift to him. He delivered to the Atlanta Trust Company under the instruments of June 15, 1925 the subject matter of the gifts to his said son, Jack, Jr., and to his said daughter, Suzanne. His purpose in making outright delivery to his son, Hughes, and establishing the two trusts for Jack and Suzanne was not to discriminate between his children in the amount or value of the property distributed to each or to reserve any interest therein for himself, but to adapt the gift to the particular needs and circumstances of each child.

8. Said Spalding placed the subject matter of the gifts to his son, Jack, and his daughter, Suzanne, in trust to safeguard the funds against business misadventure, and not to retain an eco-

nomic benefit to himself. The business future of his son, Jack, was then uncertain, and the business of Suzanne's husband—the cotton oil business—was then faced with difficulties.

9. Said Spalding intended that under the terms of said trust instruments the funds included therein should be held as an investment fund to be used for the benefit of the donees thereof and would be beyond the reach of business misadventure. Accordingly, said trust instruments provided for the payment of income from the trust (like terms appearing in each trust instrument) "during the natural life of my son or so long as my said son does not undertake to alienate, incumber or otherwise dispose of said income * * * and so long as the same may not be subject to any process of law, or any court for any indebtedness or liability of my said son in either of which events said income shall be disposed of as hereinafter provided."

10. The trust instruments further provided that if any of the events hereinbefore set out should arise, then the income from the trust should be paid to any child or children or descendants of any child or children of said son or daughter and that upon the death of said son or daughter, the income should be paid to the child or children per stirpes until the youngest child should become of age, at which time the corpus of the trust should be divided between such child or children or descendants.

11. Said trust instruments also provided that they may be amended with the unanimous consent "of the trustee, my son and myself but in no event shall the conveyance of said stock to the party of the second part be revoked," and that additions to the trusts either during the lifetime of or by will at the death of the trustor may be made.

12. The trustor by said trust instruments gave to the trustee broad powers of investment subject to the approval of trustor or his son, or upon the death or disqualification of both, upon the approval of the Court of Ordinary of Fulton County, Georgia.

13. By none of the provisions of the trusts did the trustor intend to retain any benefit to himself but he intended thereby to add to the safety of the investment policy for said trust funds and to insure that the trust funds would be held for the purpose intended, that is, the maintenance and support of his said children and their families.

14. At the time said trust instruments were executed, trustor's son, Jack, had a wife and one young son, and trustor's daughter had a husband and five children.

15. Said Spalding intended and believed that by said trust instruments he had made absolute and completed gifts to the

donees in said instruments and that all economic benefits had
12 passed to the donees and that all rights, title, and ownership had passed from him.

16. Said Spalding intended and thought that the right to amend the trust instruments, and to supervise investments, were solely for the benefit of the donees of said trust; he did not intend or believe that in law or in fact said terms (or any of the terms of said trust instruments) made the gift incomplete or could or would be so construed, or that said gifts could be included in his estate.

17. Said Spalding made a gift tax return at full value of the property included in said trust and made no claim that the gifts were incomplete or that anything of economic value was reserved to himself.

18. Thereafter on November 23, 1927 he paid the tax at the full value of said property in the amount of Four Thousand Four Hundred Fifty-five Dollars and Twenty-nine Cents ($4,455.29).

19. Said Spalding made a second distribution of his property to his children on the 29th day of August 1934. At that time, as in the first instance, he delivered to Hughes Spalding the subject matter of the gift to him, and added certain items of property to the trusts dated June 15, 1925. He was at that time possessed of substantial wealth, and the gifts were only a small part of his property.

13 20. All benefit from the trust at all times, as was intended, went to the donees named in the trust instruments. The right to amend said trust instruments was exercised on one occasion. Said trust instruments contained a provision that if said son and daughter leave no child or descendants or child surviving them, then they may dispose of said fund by their last will and testaments, but upon failure to make such dispositions, "then said funds shall revert to me or my estate and pass to the parties taking the same in like manner as the residuum of my estate is shader." By instrument dated August 24, 1934 the trust instruments were amended (the quotation is from the trust of the daughter but a like provision was made for the son), to wit: "if my said daughter should die without leaving surviving husband or child or children or descendants of child or children and should not dispose of the corpus of said trust fund by last will and testament, then said funds shall go to her heirs and administrators, as provided by law."

21. Said Spalding intended and considered that the additional items of property added to said trusts constituted in every respect completed gifts and had the effect of taking said property out of his estate and passing full and complete title to the beneficiaries of said trusts.

22. Said Spalding returned the additions to said trusts for taxes as a gift at full value, asking and receiving no abatement in value, and paid taxes amounting to One Thousand Nine Hundred and Ninety-two Dollars and Thirty-nine Cents ($1,992.39) thereon.

23. At the time said gifts were made in August 1934, said Spalding was a man of substantial means, enjoying good health, and his purpose in making said gifts was to add to the economic security and welfare of his said children, to help them meet increased family demands, at a time of adverse economic conditions.

24. On May 1, 1937, said Spalding, by instrument in writing, renounced any and all powers retained in said trust instruments of June 15, 1925, under the following circumstances:

25. It was brought to his attention that under a recent decision of the Supreme Court of the United States, because of the right to amend said trust instruments, the gifts intended by him to be completed gifts had not, in fact, been completed, but remained in his estate.

26. The rule of law so announced by the Supreme Court had the effect of defeating the original purpose of said Spalding, formed and carried out on June 15, 1925, and on August 29, 1934, to make to his three children an equal distribution of certain of his property, and resulted in said Spalding having made to his eldest son a completed gift and having made to his younger son and his daughter an incompleted gift contrary to his original intention. Accordingly, said Spalding, promptly upon receipt of said knowledge, and to make good his original intention, executed and delivered an instrument in writing on May 1st, 1937, which provided that "from and after this date said trust indenture as hereby modified shall not in any manner whatsoever or to any extent whatsoever be subject to any change, alteration or modification in any capacity, alone or in conjunction with other person or persons whatsoever."

27. At the time said writing was executed said Spalding was a man of advanced age, but was in good mental and physical health.

28. At that time, prior thereto, and subsequent thereto, he was engaged in many civic, political and religious activities requiring physical strength and mental vigor.

29. Among the activities engaging his attention outside of the ordinary routine of his life were the following:

(a) In June 1936, he was a delegate to and attended the National Democratic Convention in Philadelphia. He remained through the sessions of that convention and actively participated in its proceedings.

(b) In 1936, 1937, and 1938 he was President of
16 the Atlanta Historical Society, giving much time and attention to the affairs of that Society. On October 14, 1937, he gave a large dinner to the members of the Society. He presided and made a speech at the meeting.

(c) On August 15, 1936, he was host at a large dinner given to the delegates of the Democratic National Convention. He made the principal speech on that occasion.

(d) In May 1937, he attended the Kentucky Derby at Louisville, making the trip by automobile.

(e) In August 1937, he went by automobile from Atlanta to Saint Paul, Minnesota, and attended the National Convention of Catholic Charities, returning to Atlanta in September 1937, by automobile.

(f) On May 23, 1937, he was honor guest at a reception at which some five hundred guests attended, given in behalf of the Atlanta Historical Society.

30. When said Spalding executed said writing on May 1, 1937, he did not do so in contemplation of death.

31. When said Spalding executed said writing of May 1, 1937, his purpose was to acomplish legally what he thought had been acomplished by the trust agreements made on June 15, 1925.

32. Although said Spalding possessed substantial wealth
17 when he executed said writing of May 1, 1937, he made no additions to said trust fund, nor did he make any distributions to his family after August 29, 1934.

33. Said defendant contends that said writing of May 1, 1937, was made in contemplation of death and therefore the items of property contained in said trust conveyances of June 15, 1925, and August 29, 1934, are a part of said Spalding's estate.

34. Plaintiffs allege that said writing of May 1, 1937, was not made in contemplation of death and that defendant was in error in treating and taxing said property as part of the estate of said Spalding.

35. Notwithstanding the fact that said Spalding paid gift taxes of Four Thousand Four Hundred Fifty-five Dollars and Twenty-nine Cents ($4,455.29) on November 23, 1927, Fifty-two Dollars and Fifty-seven Cents ($52.57) on April 21, 1928, and One Thousand Nine Hundred Ninety-two Dollars and Thirty-nine Cents ($1,992.39) on March 4, 1935, upon the value of said trusts, said defendant in undertaking to tax said trust funds as a part of said Spalding's estate, failed to give any credit for the taxes so paid, although required by law so to do.

36. On or about August 6, 1942, plaintiffs filed with the
18 Collector of Internal Revenue for the District of Georgia a claim for refund on Treasury Department Form 843, re-

questing refund of the amounts here sued for and setting forth the facts and reasons upon which this suit is based. The Collector of Internal Revenue has taken no final action with respect to the allowance or disallowance of said refund, although a period of six months has elapsed from the filing of the same.

Wherefore, the plaintiffs pray that process issue directed to defendant, requiring him to be and appear at the next term of this Court to answer this petition, and plaintiffs pray further that they have judgment against the defendant for the sum of Sixty-two Thousand and Ninety-two Dollars and One Cent ($62,092.01) with interest thereon at six (6%) percent per annum from July 24th, 1942, together with all costs of this proceeding.

SPALDING, SIBLEY, TROUTMAN & BROCK,
JAMES A. BRANCH, Jr.,
*Attorneys for Plaintiffs.*

In United States District Court

*Answer*

Filed Aug. 2, 1943

Marion H. Allen, Collector of Internal Revenue for Georgia and defendant above, by his attorney, T. Hoyt Davis, United States Attorney for the Middle District of Georgia, answering the allegations in the bill of complaint, admits, denies, and otherwise answers such allegations paragraph by paragraph, as follows:

I

Admits the allegations in paragraph 1.

19

II

Admits the allegations in paragraph 2.

III

Admits that this is a suit of a civil nature arising under the Internal Revenue laws of the United States, but denies that defendant is indebted to the plaintiffs in the sum alleged, or for any sum whatsoever.

IV

Admits the allegations in paragraph 4.

V

Admits the allegations in paragraph 5.

VI

Admits the allegations in paragraph 6.

VII

Defendants had no information or knowledge respecting the truth or accuracy of the allegations in paragraph 7, and therefore denied each and every one therein contained.

VIII

Defendant has no information or knowledge respecting the truth or accuracy of the allegations in paragraph 8, and therefore denies each and every one therein contained.

IX

In answer to the allegations in paragraph 9, defendant avers that the instruments which said paragraph intends to interpret speak for themselves and same should be exhibited to the Court.

X

In answer to the allegations in paragraph 10, defendant avers that the instruments which said paragraph intends to interpret speak for themselves and same should be exhibited to the Court.

XI

In answer to the allegations in paragraph 11, defendant avers that the instruments which said paragraph intends to interpret speak for themselves and same should be exhibited to the Court.

XII

In answer to the allegations in paragraph 12, defendant avers that the instruments which said paragraph intends to interpret speak for themselves and same should be exhibited to the Court.

XIII

In answer to the allegations in paragraph 13 respecting an interpretation of the provisions of the trust instruments, defend-

ant makes the same answer to such alleged interpretation of the trust instruments' provisions as he has made in the paragraph preceding.

XIV

Admits the allegations in paragraph 14.

XV

Defendant has no information or knowledge respecting the alleged intention and belief of plaintiffs' testator, and
21 therefore denies each and every allegation contained in paragraph 15 of the complaint.

XVI

Defendant has no information or knowledge respecting the alleged intention and belief of plaintiffs' testator, and therefore denies each and every allegation contained in paragraph 16 of the complaint.

XVII

Denies the allegations in paragraph 17.

XVII

Denies the allegations in paragraph 18.

XIX

Admits the allegations in paragraph 19.

XX

Admits the allegations in paragraph 20.

XXI

Defendant has no information or knowledge respecting the truth or accuracy of the alleged intentions and belief of plaintiffs' testator, and therefore denies the allegations in paragraph 21.

XXII

Denies the allegations in paragraph 22.

XXIII

Defendant has no information or knowledge respecting the truth or accuracy of the alleged purpose of plaintiffs' testator

in making the gifts as alleged, and therefore denies the allegations in paragraph 23.

22

XXIV

Admits the allegations in paragraph 24.

XXV

Denies the allegations in paragraph 25.

XXVI

Since paragraph 26 of the bill of complaint constitutes an allegation of legal conclusions, defendant, not being required to answer such legal conclusions, nevertheless denies each and every one therein contained.

XXVII

In answer to paragraph 27, defendant admits the allegation that plaintiffs' testator was a man of advanced age, but denies that he was in good mental and physical health.

XXVIII

Defendant has no information or knowledge at this time respecting the truth or accuracy of the allegations in paragraph 28 of the complaint, and therefore denies such allegations.

XXIX

Defendant has no information or knowledge at this time respecting the truth or accuracy of the allegations in paragraph 29 of the complaint, and therefore denies such allegations.

XXX

Denies the allegations in paragraph 30.

23

XXXI

Denies the allegations in paragraph 31.

XXXII

Admits the allegations in paragraph 32.

XXXIII

Admits the allegations in paragraph 33.

XXXIV

Denies the allegations in paragraph 34.

XXXV

Denies the allegations in paragraph 35.

XXXVI

Admits the allegations in paragraph 36.

Wherefore, defendant respectfully prays that plaintiffs take nothing from him; that their bill of complaint be dismissed, and all costs expended herein assessed against plaintiffs.

T. HOYT DAVIS,
*United States Attorney,*
*Attorney for Defendant.*

By JOHN P. COWART,
*Assistant U. S. Attorney.*

In United States District Court

*Amendment to answer*

Filed Sept. 14, 1943

Marion H. Allen, Collector of Internal Revenue for Georgia, and defendant above, by his attorney, T. Hoyt Davis, United States Attorney for the Middle District of Georgia, with leave of the Court first being had, amends his answer heretofore
24 filed by adding thereto the following separate and secondary defense:

(a) That plaintiffs' testator on June 15, 1925, and on August 29, 1934, created a trust for his three children, as alleged in paragraph 26 of the Bill of Complaint, and admitted by the defendant in paragraph 26 of his answer; and that

(b) On or about May 1, 1937, plaintiffs' testator amended the trust described in the foregoing paragraph by surrendering the power to change, alter, or in any manner modify, alone, or in conjunction with any other person or persons whatsoever, the terms of the aforesaid trust, all as alleged in said paragraph 26 of the Bill of Complaint and admitted by the defendant in paragraph 26 of the answer; and that

(c) When plaintiffs' testator so amended the trust, as hereinbefore alleged and admitted, under the law and the facts, he

made by such surrender of his right or power to amend the trust instrument a gift in 1937 of a value of $105,745.21; and that

(d) Neither plaintiffs' testator nor plaintiffs, nor any one for plaintiffs' testators or plaintiffs, have paid the Federal gift tax on such gift, nor any part thereof and that the Federal gift tax thereon in the amount of $11,619.46, plus interest thereon from its due date in 1938, is still owing by the plaintiffs.

Wherefore, Defendant respectfully prays that should the Court award any relief to the plaintiffs in this cause, that from such award should be subtracted, or against such award there should be offset or recouped, the said amount of $11,619.46 Federal gift taxes for the year 1937, plus interest thereon from its due date at the rate of 6 per cent per annum, as provided by law.

T. HOYT DAVIS,
*United States Attorney.*

*Order*

The foregoing amendment read and considered. It is ordered that the same be allowed filed this the 14th day of September 1943, subject to objection.

BASCOM S. DEAVER,
*United States Judge.*

Presented by:
CHAS. W. WALKER,
*Assistant United States Attorney.*

In United States District Court

*Reply*

Filed Oct. 9, 1943

Now comes plaintiffs and in reply to the new and affirmative matter set up by defendant in its pleading called "Amendment" respectfully shows:

I

Plaintiffs admit the allegations of paragraph (a) thereof.

II

Plaintiffs admit the allegations of paragraph (b) thereof.

III

Plaintiffs deny the allegations of paragraph (c) thereof.

26

IV

Paragraph (d) thereof is denied.

V

Further replying, plaintiffs show:

1. Plaintiffs' testator filed a return and paid a gift tax on the property originally transferred to said trusts in 1925, as alleged in paragraph (a). The values shown by plaintiffs' testator on said return were increased by the Revenue Agent and additional gift tax was assessed against plaintiffs' testator on account thereof, and said tax as increased was paid in full by plaintiffs' testator on the full value of said property so transferred to said trusts. Plaintiffs' testator also made a gift tax return showing the property conveyed to said trusts on August 29, 1934, referred to in paragraph (a), and paid a gift tax on the full value of the property then transferred to said trusts. Regulation 108, section 83.6, provides:

"If for any calendar year prior to the calendar year 1939 a transfer has been subjected to payment of tax despite the fact that the donor retained a power to name new beneficiaries or to change the interests of the beneficiaries as between themselves, and if the tax for such calendar year has been finally determined on such basis, and for all gift tax purposes such transfer has been treated, for such calendar year and each subsequent calendar year, as subject to the tax, and the donor agrees, in a closing agreement executed under the provisions of section 3760, that he will continue so to treat such transfer, then the relinquishment or

27 termination of the power so retained by the donor shall not be treated as a gift subject to the tax."

Regulation 108, Sec. 83.6

2. The said transfers made by plaintiffs' testator in 1925 and 1934 have been subjected to the payment of the tax and the tax for each of such years has been finally determined and such transfers have been treated for such calendar year and for each subsequent calendar year as subject to the tax, and plaintiffs are willing and hereby offer to agree and do agree that they will continue to so treat such transfers.

3. If there would otherwise be a gift tax due in 1937 as claimed by defendant, plaintiffs are entitled to the benefit of the above quoted regulation and it would be a denial of due process of the law and equal protection of law to deny plaintiffs the benefit of

said regulation, while systematically extending the same to other taxpayers similarly situated.

4. Defendant in said Amendment is seeking to tax plaintiffs a second time on said transfers although plaintiffs' testator has already been subjected to a tax on the full value thereof, and defendant does not offer to give plaintiffs any credit for the tax already assessed and paid on said transfers, and plaintiffs are in equity and good conscience entitled to credit for the tax already paid thereon.

5. No claim has previously been made that either plaintiffs or plaintiffs' testator owed any additional gift taxes for the
28 year 1937 and no notice of any proposed deficiency was given to either plaintiffs or plaintiffs' testator.

6. If plaintiffs owe any additional gift tax for the year 1937, plaintiffs are ready and willing and hereby offer to pay the same.

7. If any such additional gift taxes were owing by plaintiffs' testator, as claimed by defendant, then plaintiffs are entitled to a deduction for estate tax purposes in the amount of said gift tax so owing, with interest thereon to the date of death of plaintiffs' testator, and are entitled to a corresponding reduction in and refund of said estate tax.

8. If said property is includable in said gross estate, then plaintiffs are entitled to credit against the estate tax for any gift tax plaintiffs may be required to pay thereon.

SPALDING, SIBLEY & TROUTMAN,
JOHN A. SIBLEY,
FURMAN SMITH,
*Attorneys for Plaintiffs,*
*434 Trust Co. of Ga. Bldg., Atlanta, Ga.*

I, Furman Smith, hereby certify that I am of counsel for plaintiffs in the above stated case and I have served the foregoing reply on defendant by mailing a copy thereof properly stamped and addressed to his attorney of record, T. Hoyt Davis, Esquire, United States Attorney, Government Building, Macon, Georgia, this the 8th day of October 1943.

FURMAN SMITH.

29 In United States District Court

*Motions to dismiss*

Filed Sept. 4, 1944

Now comes Marion H. Allen, Collector of Internal Revenue for Georgia, the defendant herein, by his attorney, T. Hoyt Davis, United States Attorney for the Middle District of Georgia, and

moves the Court to dismiss this action because the complaint fails to state a claim against defendant upon which relief can be granted.

This 4th day of March 1944.

T. HOYT DAVIS,
*United States Attorney.*
By CHAS. W. WALKER,
*Asst. United States Attorney.*

To Messrs. Spalding, Sibley and Troutman, Attorneys at Law, 434 Trust Company of Georgia Building, Atlanta, Georgia, Attorneys for Plaintiff:

Please take notice that the undersigned will bring the above and foregoing motion on for hearing before this Court in the Chambers of the United States District Judge, Post Office Building, Macon, Georgia, on the 15th day of March 1944, at 9 o'clock A. M., C. W. T., of that day or as soon thereafter as counsel can be heard.

This 4th day of March 1944.

T. HOYT DAVIS,
*United States Attorney.*
By CHAS. W. WALKER,
*Asst. United States Attorney.*

30 In United States District Court

*Amendment to petition*

Filed April 13, 1944

Now comes the plaintiffs and after leave of Court first obtained, amend Paragraph 6 of the Complaint by adding thereto the following allegations:

The trust instruments of June 15, 1925, and August 29, 1934, between Jack J. Spalding and his son and daughter, Jack and Suzanne, are hereto attached and marked Exhibit A and made a part of this Complaint.

6 (a) The motive and inducing cause of the gifts of June 15, 1925, arose out of the following facts:

Suzanne's husband owned and operated an independent oil mill business at Albany, Georgia, prior to 1925. Suzanne was a member of the firm. The business had suffered financial reverses and had been pressed severely for payment by the banks. In December 1924, Mr. Spalding put up for Suzanne $10,000.00 to relieve her from certain obligations that the partnership business owed the banks. The circumstances under which said money was

advanced and the pressing need therefor are set forth in Mr. Spalding's letter of December 30, 1924, to his daughter Suzanne, the material parts of which are hereto attached and marked "Exhibit B."

The gift of June 15, 1925, followed closely on Suzanne's financial reverses. Her indebtedness was cleared up in December 1924, her husband was without a job and was without financial resources and under heavy financial obligations. The gift of June 15, 1925,
emanated from Mr. Spalding's desire to protect Suzanne
31 and her family from want and to provide means by which
her children might be supported and educated. At the time said gift of June 15, 1925, to Jack and Suzanne was made Mr. Spalding wrote a letter to said Jack and Suzanne dated June 16, 1925, outlining the reasons and motive of said gift, a copy of which letters are hereto attached and marked "Exhibits C and D."

6 (b) When said gifts of August 29, 1934, were made this country had not recovered from the panic that had started in 1929. One of Mr. Spalding's children at that time had suffered heavy losses due to the shrinkage of values and had incurred heavy obligations. It was the purpose of Mr. Spalding in making the gifts of August 29, 1934, to meet the needs of his children and to relieve one of them from the disaster of said panic. At the time said gift of August 1934, was made to said Jack and Suzanne, Mr. Spalding stated to his sons and daughter the reasons therefor in a letter dated August 28, 1934, copies of which letters are hereto attached and marked "Exhibits E, F, and G."

6 (c) Neither said transfers of June 15, 1925, nor said transfers of August 29, 1934, nor said writings of May 1, 1937, were made in contemplation of death.

Said Paragraph 6, as amended, shall read as follows:

The aforesaid deficiency resulted from the addition by the Commissioner of certain property to the gross estate of Jack J.
Spalding, consisting of certain items of stocks and bonds
32 included in two certain trusts under which the Citizens and
Southern National Bank of Atlanta is now the acting trustee, created by Jack J. Spalding on June 15, 1925, for the benefit of his son, Jack J. Spalding, Jr., and his daughter, Suzanne Spalding Schroder. Part of these assets was delivered by Jack J. Spalding to the trustee when the trusts were created and part was added to said trusts on August 29, 1934, by Jack J. Spalding. Said two instruments will be exhibited as often as may be required.

The trust instruments of June 15, 1925, and August 29, 1934, between Jack J. Spalding and his son and daughter, Jack and

Suzanne, are hereto attached and marked "Exhibit A" and made a part of this Complaint.

(a) The motive and inducing cause of the gifts of June 15, 1925, arose out of the following facts:

Suzanne's husband owned and operated an independent oil mill business at Albany, Georgia, prior to 1925. Suzanne was a member of the firm. The business had suffered financial reverses and had been pressed severely for payment by the banks. In December 1924, Mr. Spalding put up for Suzanne $10,000.00 to relieve her from certain obligations that the partnership business owed the banks. The circumstances under which said money was advanced and the pressing need therefor are set forth in Mr. Spalding's letter of December 30, 1924, to his daughter Suzanne, the material parts of which are hereto attached and marked "Exhibit B."

33 The gift of June 15, 1925, followed closely on Suzanne's financial reverses. Her indebtedness was cleared up in December 1924; her husband was without a job and was without financial resources and under heavy financial obligations. The gift of June 15, 1925, emanated from Mr. Spalding's desire to protect Suzanne and her family from want, and to provide means by which her children might be supported and educated. At the time said gift of June 15, 1925, to Jack and Suzanne was made Mr. Spalding wrote a letter to said Jack and Suzanne dated June 16, 1925, outlining the reasons and motive of said gift, a copy of which letters are hereto attached and marked Exhibits C and D."

(b) When said gifts of August 29, 1934, were made this country had not recovered from the panic that had started in 1929. One of Mr. Spalding's children at that time had suffered heavy losses due to the shrinkage of values and had incurred heavy obligations. It was the purpose of Mr. Spalding in making the gifts of August 29, 1934, to meet the needs of his children and to relieve one of them from the disaster of said panic. At the time said gift of August 1934 was made to said Jack and Suzanne, Mr. Spalding stated to his sons and daughter the reasons therefor in a letter dated August 28, 1934, copies of which letters are hereto attached and marked "Exhibits E, F, and G."

(c) Neither said transfers of June 15, 1925 nor said transfers of August 29, 1934, nor said writings of May 1, 1937, were made in contemplation of death.

Plaintiffs also amend, with the leave of the Court, Para-
34 graph 25 of the Complaint by striking therefrom the words "a recent decision of the Supreme Court of the United States," and inserting in lieu thereof the words "the recent de-

cision of the Supreme Court of the United States in the case of Helvering v. City Bank Farmers Trust Company, 296 U. S. 85," so that said paragraph, as amended, will read as follows:

It was brought to his attention that under the recent decision of the Supreme Court of the United States in the case of Helvering v. City Bank Farmers Trust Company, 296, U. S. 85, because of the right to amend said trust instruments, the gifts intended by him to be completed gifts had not, in fact, been completed, but remained in his estate.

Wherefore the plaintiffs respectfully pray that this amendment be allowed filed and made part of said Complaint.

SPALDING, SIBLEY & TROUTMAN,
*—Attorneys for Plaintiffs.*

*Order*

The foregoing amendment read and considered. It is ordered that the same be allowed filed as part of the Complaint, this the 15 day of March 1944.

BASCOM S. DEAVER,
*United States Judge.*

35 *Exhibit A to amendment*

COPY

GEORGIA,
*Fulton County:*

This writing made and entered into this the 15th day of June A. D. 1925, by and between Jack J. Spalding, of said State and County, as party of the first part, and Atlanta Trust Company, a corporation of said County, as party of the second part, witnesseth:

1. The party of the first part hereby conveys to the party of the second part, and its successors, five hundred (500) shares of the first preferred eight percent (8%) cumulative stock, Series 1922, of the Georgia Railway and Power Company, hereby investing said party of the second part, its successors and assigns, with the full title thereto for the purposes hereinafter set forth.

2. The said party of the second part shall collect all dividends and income from said stock and from any property at any time in which the proceeds of said stock may be invested, and will pay over to my daughter, Mrs. Suzanne Spalding Schroder, monthly in equal installments, the net incomes arising therefrom, after deducting all taxes, governmental charges, and its commission, for and during the natural life of my said daughter, or so long as

my said daughter does not undertake to alienate, incumber or otherwise dispose of the said incomes, any part thereof, or interest therein, and so long as the same may not be subjected to any process of law, or any court, for any indebtedness or
36 liability of my said daughter, in either of which events the said incomes shall be disposed of as hereinafter provided.

3. If either of the events aforementioned arises, and said party of the second part shall cease to pay the said incomes to my said daughter, and in that event the said party of the second part shall pay the same to, or for the benefit of the child, or children, then living of my said daughter, or the descendants of any deceased child, or children, then living, such descendants to take per stirpes, until the time of the death of my said daughter.

4. Upon the death of my said daughter the said party of the second part will pay the said incomes and profits so arising to the child, or children, of my said daughter, and the descendants of any dead child, or children, taken per stirpes, until the youngest child of my said daughter becomes of age, at which time said party of the second part shall turn over the entire fund to such child, or children, or the descendants of such dead child, or children, they taking per stirpes as may be then living, in fee simple. If my said daughter leave no child, or descendants of a child, surviving her; then she may dispose of said fund by her last will and testament as she may wish, but if she does not do so, then said fund shall revert to me, or my estate, and pass to the parties taking the same in like manner as the residuum of my estate is shared.

5. The said party of the second part shall have full power and authority to sell during my lifetime on my written consent, and after my death on the like written consent of my said
37 daughter, any part, or all, of said stock, or any property in which the same may be invested, without any order of Court, at a public or private sale, and to invest the purchaser thereof with good title thereto. The proceeds of any such sale shall be invested by the party of the second part, or its successors, in what it considers safe securities or property, subject to all of the terms and provisions of this writing, and such sale and reinvestment shall not be exhausted by one exercise thereof, but shall continue.

6. During my life, by the unanimous consent of the said trustee, my said daughter and of myself, the terms of this agreement may be amended, changed, enlarged or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked.

7. During my life time any vacancy that may arise in said trusteeship by resignation, or otherwise, shall be filled by written appointment of me and my said daughter, and after my death any such vacancy shall be filled in the same way by my said daughter, with the approval of the Ordinary of Fulton County, Georgia.

The said party of the second part, and any successor, shall be subject to removal by any court exercising equitable jurisdiction in Fulton County, Georgia, upon sufficient cause shown.

8. The said party of the second part shall not create any incumbrance, lien or charge upon the said stock, nor any proceeds thereof, or upon any of the incomes or profits arising therefrom, and shall not make any advances of income, but shall pay
38 the same in monthly installments as aforesaid.

9. The compensation of said party of the second part for collecting and distributing said incomes shall be two and a half percent (2½%) of the amount of said incomes, which shall be retained by it, together with any taxes or other proper public charges against the said income.

10. If during my life time I should become incapacitated from any cause from exercising the consent for sale of the property embraced herein, then such consent may be given by my said daughter, and after my death, if my said daughter should become incapacitated from any cause from exercising and giving such consent, then the party of the second part shall be authorized to sell the same upon the written consent of the Ordinary of Fulton County, Georgia, given at Chambers.

11. Any successor of the party of the second part shall be vested with all rights and powers, and be subject to all of the limitations, duties and obligations provided for herein for the party of the second part.

12. It is expressly provided that the party of the first part may by written conveyance from time to time, and by his last will and testament make additions to the property hereby conveyed, and when made the same shall be subject to all the provisions, terms and conditions contained in this conveyance, the same as if originally embraced herein.

13. All stock dividends and profits from sales of any part of said property shall be owned by the party of the second part and add to the corpus in its hands.

39 14. The parts of the second part shall upon my reasonable request, and upon the reasonable request of my daughter after my death, furnish a correct statement showing the administration of said fund, the exact property in which it is then invested, and exhibit the proper evidence of title to such property.

In witness whereof, said party of the first part has hereunto set his hand and affixed his seal, in three sets, the day and date aforesaid.

[SEAL]. (Signed) JACK J. SPALDING.

Witness:
M. G. BELLIVEAU,
*Notary Public.*

The Atlanta Trust Company acknowledges receipt of said stock and accepts the conveyance made in the foregoing instrument, subject to the terms, provisions and conditions thereof.

This the 15th day of June 1925.

ATLANTA TRUST COMPANY,
By J. B. WHEAT,
*Trust Officer.*

40 COPY

GEORGIA,
*Fulton County:*

This writing, made and entered into this 24th day of August A. D. 1934, by and between Jack J. Spalding, party of the first part, and Atlanta Trust Company, a corporation, both of said County, as party of the second part, witnesseth:

That the annexed agreement between said parties, dated the 15th day of June 1925, provides in paragraph 6 thereof, that during the life of said first party hereto, by the unanimous consent of the first party, of said second party, as Trustee, and of Suzanne Spalding Schroder, the terms of said annexed agreement may be "amended, changed, enlarged, or limited, but in no event shall the conveyance of the stock therein mentioned to the party of the second part be revoked";

Pursuant to said provision in said contract, it is hereby unanimously agreed that the same be amended, changed, enlarged and limited to read as follows:

1. The trust fund conveyed by paragraph 1 of said annexed agreement originally conveying five hundred shares of first preferred eight percent cumulative stock of Georgia Railway & Power Company, has, by sale and reinvestment, resulted in the Trustee now having in hand as the proceeds of said original trust, the following securities, to wit:

327 Shares Georgia Power Company $6 Preferred Stock;
41 500 Shares Haverty Furniture Companies, Inc., 7½% Preferred Stock;
100 Shares Atlantic Ice & Coal Company 7½% Preferred Stock;
100 Shares Southern Spring Bed Company 7% Preferred Stock;

85 Shares American Bakeries Corporation 7% Preferred Stock.

2. Said party of the second part, and its successors, shall collect all dividends and incomes from said stock, and from any property at any time, in which the proceeds of said stock may be invested, and will pay over to my daughter, Suzanne Spalding Schroder, monthly in equal installments, the incomes arising therefrom, after deducting all taxes, governmental charges, and its commissions, for and during the natural life of my said daughter, and with the written consent of my said daughter, Suzanne Spalding Schroder, shall have full power to sell at public or private sale, without any order of court, on terms acceptable to it, the whole or any part of said trust fund, and invest the purchaser with fee simple title thereto, and upon like written consent, to reinvest the proceeds in its discretion, for the same trustee, without any order of court, either for sale or reinvestment, and all property purchased by said trust company and its successors, in administering this trust, shall be held by it subject to the trusts of this agreement. It may make such sales and reinvestments upon such consents, from time to time, and the right to do shall be exhausted by making previous sales and reinvestments. 42 Upon the death of my said daughter during the continuance of this trust, it may make such sales and reinvestments without any consent.

3. The incomes from said trust hereby directed to be paid to my said daughter, Suzanne Spalding Schroder, by said Trust Company as Trustee, are personal to her, and if at any time the said incomes should cease to be enjoyed by her, either by reason of any attempted alienation thereof, or otherwise, the said Trustee is hereby expressly authorized and directed to cease paying the said incomes to her during the time said reason exists, and its judgment and discretion in deciding as to the same shall be conclusive. During the time said Trustee ceases to pay such incomes to her, then the same shall be paid by said Trustee during such period up to the balance of her natural life to her surviving husband and child or children, in equal amounts, the descendants of any grandchild that may be dead to take per stirpes.

4. Upon the death of my said daughter, Suzanne Spalding Schroder, the party of the second part and its successors will pay the said incomes and proceeds so arising to the surviving husband and child or children of my said daughter, in equal amounts, the descendants of any dead child or children taking per stirpes, until the youngest child of my said daughter becomes of age, at which time said Trustee and its successors shall turn over in fee simple and in equal amounts the entire funds to her surviving husband

and such child or children, or the descendants of such dead child or children as may be then in life, children taking per stirpes.

If my said daughter should die without leaving a surviving
43 husband, or child or children, or descendants of child or children, and should not dispose of the corpus of said trust fund by last will and testament, then said fund shall go to her heirs and administrators, as provided by law.

5. During my life, by the unanimous consent of said Trustee and its successors, and of my said daughter and myself, the terms of this agreement may be amended, changed, enlarged, or limited, but in no event shall the right to revoke any conveyance heretofore or hereafter made to said Trustee, of any property, be permitted.

6. Any vacancy in said trusteeship that may occur during my life, by resignation or otherwise, shall be filled by written appointment of me and my said daughter, Suzanne Spalding Schroder, and after my death any such vacancy shall be filled in the same way by my said daughter.

The party of the second part, and any successor as Trustee, shall be subject to removal by any court exercising equitable jurisdiction in Fulton County, Georgia, for cause shown.

7. The said party of the second part, and its successors, shall not create any encumbrance, lien, or charge upon the said trust estate, or any proceeds thereof, nor upon the incomes or proceeds arising therefrom, and shall not make any advances of income, but shall pay the same in monthly installments, as aforesaid.

8. The compensation to the party of the second part for collecting and distributing said incomes shall be two and one-half
44 percent (2½%) of the amount of said income, which shall be retained by it, together with any taxes or other proper charges against the said trust fund.

9. If, during my lifetime, I should become incapacitated from any cause, from exercising the consent to the sale of the property embraced herein, or any other consent that would be required of me hereunder, then such consent may be given by my said daughter, Suzanne Spalding Schroder, and after my death, if my said daughter should become incapacitated from any cause from exercising and giving such consent, then the party of the second part will be authorized to act upon the written consent of the Ordinary of Fulton County, Georgia, given at Chambers.

10. Any successor to the party of the second part shall be vested with all rights and powers, and be subject to all the limitations, duties and obligations provided for herein for the party of the second part.

11. All stock dividends and profits from sales of any part of said trust estate shall be owned by the party of the second part, its successors, as a part of the corpus in its hands.

12. It is expressly provided that party of the first part, or his said daughter, may by written conveyance, from time to time or by my last will and testament, make additions to the property hereby conveyed, and when made the same shall be subject to all the provisions, terms and conditions contained in this conveyance, the same as of originally embraced herein.

13. The party of the second part shall, upon my reasonable request, or that of my daughter, after my death, furnish a correct statement showing the administration of said fund, and the exact property in which it is then invested, and exhibit the proper evidence of title to such property.

14. The acts and doings of the said Trustee, to this date, are in all respects hereby ratified, approved and confirmed.

15. The Atlanta Trust Company hereby resigns as Trustee under this agreement, because it is liquidating its business, and the Citizens & Southern National Bank, of Atlanta, is hereby appointed successor of said Trust Company, with all of the rights, powers and privileges, and subject to all the terms and conditions of this trust. The Atlanta Trust Company will make all necessary transfers of stock, and do all things necessary to fully invest its successor with right and title to all of the stocks and other assets of said trust.

In witness whereof, said party of the first part has hereunto set his hand and affixed his seal, and the said Suzanne Spalding Schroder and said Atlanta Trust Company, as showing their consent and unanimous agreement to these changes, have also signed the same, the day and year first above written. All done in three sets.

[SEAL] (Signed) SUZANNE SPALDING SCHRODER,
[SEAL] (Signed) JACK J. SPALDING.

ATLANTA TRUST COMPANY,
*Trustee.*

[SEAL] By (Signed) J. B. WHEAT,
[CORPORATE SEAL] *Assistant Secretary.*

The Citizens & Southern National Bank of Atlanta hereby accepts the foregoing trust, subject to all of the terms, conditions and provisions thereof and with all the rights, powers, and duties specified therein. It acknowledges receipt of the trust estate therein set out from the former Trustee, The Atlanta Trust Company.

This August 29, 1934.

THE CITIZENS & SOUTHERN NATIONAL BANK,
[SEAL] By (Signed) L. H. PARRIS, *Asst. Trust Officer.*

COPY

GEORGIA,

*Fulton County:*

This agreement, made this 29th day of August 1934, between Jack J. Spalding, party of the first part, and The Citizens & Southern National Bank, a national banking association with an office in Atlanta, Georgia, as party of the second part, witnesseth:

Whereas, on the 15th day of June A. D. 1925, the first party hereto executed an agreement with the Atlanta Trust Company, a corporation of said county, in three sets, one of which is hereto attached; and

Whereas, on the 24th day of August 1934, the party of the first part, and the said Atlanta Trust Company and Suzanna Spalding Schroder executed an agreement in three sets, one of which
47 is attached hereto, in and by which said last agreement said Atlanta Trust Company resigned as Trustee under said attached agreement, and the party of the second part hereto was appointed successor in the trust embraced by the said agreements attached hereto; and

Whereas, in paragraph 12 of said agreement of the 24th day of August 1934, attached hereto, it is expressly provided that party of the first part may by written conveyance, from time to time, and by his last will and testament, make additions to the property hereby conveyed, and when made the same shall be subject to all the provisions, terms, and conditions contained in this conveyance the same as if originally embraced therein;

Now, therefore, the first party hereto has conveyed, and does hereby confirm and convey to said second party, The Citizens & Southern National Bank, as Trustee, the following property, to wit: (Market Value appraised by Robinson-Humphrey Company for me.)

| Par value | Issuing authority, interest rate, maturity, and numbers | Market value | Accrued interest to 8/29/34 |
|---|---|---|---|
| $5,000.00 | City of Atlanta, 5's due 1/1/46, Nos. 3263-3267 (inc.) | $5,500.00 | $36.25 |
| 5,000.00 | City of Savannah, 4½'s due 8/1/41, Nos. 155-158 (inc.) and 163 | 5,387.50 | 17.50 |
| 5,000.00 | Rabun County, 5's due 11/9/55, Nos. 17-20 (inc.) and 31 | 5,600.00 | 40.28 |
| 10,000.00 | Thomas County 5's due 1/1/47, Nos. 416-425 (inc) | 11,100.00 | 122.22 |
| 2,000.00 | Richmond County, 4½'s due 1/1/48, Nos. 257 and 258 | 2,180.00 | 14.50 |
| 48 500.00 | City of Savannah, 4½'s due 7/1/43, No. 18 | 542.50 | 3.63 |
| 27,500.00 | | 30,310.00 | 234.38 |
| Market value above bonds | | $30,310.00 | |
| Accrued interest to August [illegible], 1934 | | 234.38 | |
| Total value of gift | | 30,544.38 | |

The said party of the second part hereto, as such Trustee, and its successors, shall own, hold, administer, and dispose of the principal of said property, and the incomes and profits there-

from as specified in said agreement annexed hereto, dated the 24th day of August 1934, subject to all the terms, provisions, and conditions, and with all the rights, powers, and privileges contained in said agreement, as fully and completely as if said securities had been originally conveyed by said agreement.

Witness the hand and seal of the party of the first part, the day and date aforesaid. Executed in three sets.

(Signed) JACK J. SPALDING. [SEAL].

The Citizens & Southern National Bank, as Trustee, hereby acknowledges receipt of the securities enumerated above, and accepts the trust thereof under the terms of said trust agreement annexed.

This August 29, 1934.

THE CITIZENS & SOUTHERN NATIONAL BANK,
*Trustee.*

[SEAL]

By (Signed) T. C. ERWIN,
*Vice Pres. and Trust Officer.*

[BANK SEAL].

49 COPY

GEORGIA,
*Fulton County:*

This writing made and entered into this the 15th day of June A. D. 1925, by and between Jack J. Spalding, of said State and County, as party of the first part, and Atlanta Trust Company, a corporation of said County, as party of the second part, witnesseth:

1. The party of the first party hereby conveys to the party of the second part, and its successors, five hundred (500) shares of the first preferred eight per cent (8%) cumulative stock, Series 1922, of the Georgia Railway and Power Company, hereby investing said party of the second part, its successors and assigns, with the full title thereto for the purposes hereinafter set forth.

2. The said party of the second part shall collect all dividends and incomes from said stock and from any property at any time in which the proceeds of said stock may be invested, and will pay over to my son, Jack Spalding, Jr., monthly in equal installments, the net incomes arising therefrom, after deducting all taxes, governmental charges, and its commission, for and during the natural life of my said son, or so long as my said son does not undertake to alienate, incumber or otherwise dispose of the said incomes, any part thereof, or interest therein, and so long as the same may

not be subjected to any process of law, or any court, for any indebtedness or liability of my said son, in either of which events the said incomes shall be disposed of as hereinafter provided.

3. If either of the events aforementioned arises, and said party of the second part shall cease to pay the said incomes to my said son, and in that event the said party of the second part shall pay the same to, or for the benefit of the child or children, then living of my said son, or the descendants of any deceased child, or children, then living, such descendants to take per stirpes, until the time of the death of my said son.

EXHIBIT A

4. Upon the death of my said son the said party of the second part will pay the said incomes and profits so arising to the child, or children, of my said son, and the descendants of any dead child, or children, taking per stirpes; until the youngest child of my said son becomes of age, at which time said party of the second part shall turn over the entire fund to such child, or children, or the descendants of such dead child, or children, they taking per stirpes as may be then living, in fee simple. If my said son leave no child, or descendants of a child, surviving him, then he may dispose of said fund by his last will and testament as he may wish, but if he does not do so, then said fund shall revert to me, or my estate, and pass to the parties taking the same in like manner as the residium of my estate is shared.

5. The said party of the second part shall have full power and authority to sell during my lifetime on my written consent, and after my death on the like written consent of my said son, any part, or all, of said stock, or any property in which the same may be invested, without any order of Court, at public or private sale, and to invest the purchasers thereof with good title thereto. The proceeds of any such sale shall be invested by the party of the second part, or its successors, in what it considers safe securities or property, subject to all of the terms and provisions of this writing, and such sale and reinvestment shall not be exhausted by one exercise thereof, but shall continue.

6. During my life, by the unanimous consent of the said trustee, my said son and of myself, the terms of this agreement may be amended, changed, enlarged or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked.

7. During my lifetime any vacancy that may arise in said trusteeship by resignation, or otherwise, shall be filled by written ap-

pointment of me and my said son, and after my death any such vacancy shall be filled in the same way by my said son, with the approval of the Ordinary of Fulton County, Georgia.

8. The said party of the second part shall not create any incumbrance, lien or charge upon the said stock, nor any proceeds thereof, or upon any of the incomes or profits arising therefrom, and shall not make any advances of income, but shall pay the same in monthly installments as aforesaid.

9. The compensation of said party of the second part for collecting and distributing said incomes shall be two and a half percent (2½%) of the amount of said income, which shall be retained by it, together with any taxes or other proper public charges against the said income.

52 10. If during my lifetime I should become incapacitated from any cause from exercising the consent for sale of the property embraced herein, then such consent may be given by my said son, and after my death, if my said son should become incapacitated from any cause from exercising and giving such consent, then the party of the second part shall be authorized to sell the same upon the written consent of the Ordinary of Fulton County, Georgia, given at Chambers.

11. Any successor of the party of the second part shall be vested with all rights and powers, and be subject to all of the limitations, duties and obligations provided for herein for the party of the second part.

12. It is expressly provided that the party of the first part may by written conveyance from time to time, and by his last will and testament make additions to the property hereby conveyed, and when made the same shall be subject to all the provisions, terms and conditions contained in this conveyance, the same as if originally embraced herein.

13. All stock dividends and profits from sales of any part of said property shall be owned by the party of the second part and add to the corpus in its hands.

14. The party of the second part shall upon my reasonable request, and upon the reasonable request of my son after my death, furnish a correct statement showing the administration of said fund, the exact property in which it is then invested, and exhibit the proper evidence of title to such property.

53 In witness whereof, said party of the first part has hereunto set his hand and affixed his seal, in three sets, the day and date aforesaid.

(Signed) JACK J. SPALDING. [SEAL]

Witness:

M. G. BELLEVEAU,
*Notary Public.*

The Atlanta Trust Company acknowledges receipt of said stock and accepts the conveyance made in the foregoing instrument, subject to the terms, provisions, and conditions thereof.

This the 15th day of June 1925.

ATLANTA TRUST COMPANY,
[SEAL] By J. B. WHITE, *Trust Officer.*

COPY

GEORGIA,—
*Fulton County:*

This writing, made and entered into this 24th day of August A. D. 1934, by and between Jack J. Spalding, party of the first part, and Atlanta Trust Company, a corporation, both of said County, as party of the second part, witnesseth:

That the annexed agreement between said parties, dated the 15th day of June 1925, provides in paragraph 6 thereof, that during the life of said first party hereto, by the unanimous consent of said second party as Trustee, of said first party, and Jack
54 Spalding, Jr., the terms of said annexed agreement may be "amended, changed, enlarged, or limited, but in no event shall the conveyance of the stock therein mentioned to the party of the second part be revoked":

Pursuant to said provision in said contract, it is hereby unanimously agreed that the same be amended, changed, enlarged, and limited to read as follows:

1. The trust fund conveyed by paragraph 1 of said annexed agreement originally conveying five hundred share of first preferred 8% cumulative stock of Georgia Railway & Power Company, has, by sale and reinvestment, resulted in the Trustee now having in hand as the proceeds of said original trust, the following securities, to wit:

500 shares Haverty Furniture Companies, Inc., Preferred 7½% Stock;

74 Shares Southern Spring Bed Company Preferred 7% Stock;

132 Shares Atlantic Ice & Coal Company Preferred 7½% Stock;

50 Shares Atlanta Journal Company Preferred 6% Stock;

25 Shares Southwestern R. R. Company 5% Stock;

327 Georgia Power Company Preferred $6 Stock;

Cash in principal account, $8.66.

2. Said party of the second part, and its successors,
55 shall collect all dividends and incomes from said stock, and from any property at any time, in which the proceeds of said stock may be invested, and will pay over to my son, Jack

Spalding, Jr., monthly in equal installments, the incomes arising therefrom, after deducting all taxes, governmental charges, and its commissions, for and during the natural life of my said son, and with the written consent of my said son, Jack Spalding, Jr., shall have full power to sell at public or private sale, without any order of court, on terms acceptable to it, the whole or any part of said trust fund, and invest the purchaser with fee simple title therefo, and upon like written consent, to reinvest the proceeds in its discretion, for the same trusts, without any order of court, either for sale or reinvestment, and all property purchased by said trust company and its successors, in administering this trust, shall be held by it subject to the trusts of this agreement. It may make such sales and reinvestments upon such consents, from time to time, and the right to do so shall not be exhausted by making previous sales and reinvestments. Upon the death of my said son during the continuance of this trust, it may make such sales and reinvestments without any consent.

3. The incomes from said trust hereby directed to be paid to my said son, Jack Spalding, Jr., by said Trust Company as Trustee, are personal to him, and if at any time the said incomes should cease to be enjoyed by him, either by reason of any attempted alienation thereof, or otherwise, the said Trustee is hereby expressly authorized and directed to cease paying the said
56 incomes to him during the time said reason exists, and its judgment and discretion in deciding as to the same shall be conclusive. During the time said Trustee ceases to pay such incomes to him, then the same shall be paid by said Trustee during such period up to the balance of his natural life, to his surviving wife and child or children, in equal amounts, the descendants of any grandchildren that may be dead to take per stirpes.

4. Upon the death of my said son, Jack, the party of the second part and its successors will pay the said incomes and proceeds so arising to the surviving wife and child or children of my said son, in equal amounts, the descendants of any dead child or children taking per stirpes, until the youngest child of my said son becomes of age, at which time said Trustee and its successors shall turn over, in fee simple and in equal amounts, the entire fund to his surviving wife and such child or children, or the descendants of such dead child or children as may be then in life, children taking per stirpes. If my said son should die without leaving a surviving wife, or child or children, or descendants of child or children, and should not dispose of the corpus of said trust fund by last will and testament, then said fund shall go to his heirs and administrators, as provided by law.

5. During my life, by the unanimous consent of said Trustee and its successors, and of my said son and myself, the terms of

this agreement may be amended, changed, enlarged, or limited, but in no event shall the right to revoke any conveyance heretofore or hereafter made to said Trustee, of any property, be permitted.

57 6. Any vacancy in said trusteeship that may occur during my life, by resignation or otherwise, shall be filled by written appointment of me and my said son, Jack, and after my death any such vacancy shall be filled in the same way by my said son.

The party of the second part, and any successor as Trustee shall be subject to removal by any court exercising equitable jurisdiction in Fulton County, Georgia, for cause shown.

7. The said party of the second part and its successors, shall not create any encumbrance, lien, or charge upon the said estate, or any proceeds thereof, nor upon the incomes or proceeds arising therefrom, and shall not make any advances of income, but shall pay the same in monthly installments, as aforesaid.

8. The compensation to the party of the second part for collecting and distributing said incomes shall be two and one-half percent (2½%) of the amount of said income, which shall be retained by it, together with any taxes or other proper charges against the said trust fund.

9. If, during my lifetime, I should become incapacitated from any cause, from exercising the consent to the sale of the property embraced herein, or any other consent that would be required of me hereunder, then such consent may be given by my said son, Jack, and after my death, if my said son should become incapacitated from any cause from exercising and giving such consent, then the party of the second part will be authorized to act upon the written consent of the Ordinary of Fulton County, Georgia, given at Chambers.

58 10. Any successor to the party of the second part shall be vested with all rights and powers, and be subject to all the limitations, duties and obligations provided for herein for the party of the second part.

11. All stock dividends and property from sales of any part of said trust estate shall be owned by the party of the second part, its successors, as a part of the corpus in its hands.

12. It is expressly provided that party of the first part, or his said son, may by written conveyance, from time to time by my last will and testament, make additions to the property hereby conveyed, and when made, the same shall be subject to all the provisions, terms and conditions contained in this conveyance, the same as if originally embraced herein.

13. The party of the second part shall, upon my reasonable request and that of my son, after my death, furnish a correct state-

ment showing the administration of said fund, and the exact property in which it is then invested, and exhibit the proper evidence of title to such property.

14. My said son, Jack Spalding, Jr., made an addition to said trust fund on May 28, 1929, by placing in said trust certain properties of his own, upon the terms set forth in the annexed writing of said date between him and said Atlanta Trust Company. Said addition consisted of stocks in corporations, and said stocks, or other securities resulting from their sale and reinvestment, are now in the possession of said Trustee, as follows, to wit:

59 26 Shares Southern Spring Bed Company Preferred 7% Stock;

68 Shares Atlantic Ice & Coal Company Preferred 7½% Stock;

100 Shares American Bakeries Corporation Preferred 7% Stock;

37 Shares Georgia Power Company Preferred 6% Stock;

80 Shares Atlanta, Birmingham & Coast R. R. Preferred 6% Stock;

Cash in principal account, $12.00

15. The acts and doings of the said Trustee, to this date, are in all respects hereby ratified, approved and confirmed.

16. The Atlanta Trust Company hereby resigns as Trustee under this agreement, because it is liquidating its business, and The Citizens & Southern National Bank, of Atlanta, is hereby appointed successor of said Trust Company, with all of the rights, powers, and privileges, and subject to all the terms and conditions of this trust. The Atlanta Trust Company will make all necessary transfers of stock, and do all things necessary to fully invest its successor with right and title to all of the stocks and other assets of said trust, including those conveyed to it by Jack Spalding, Jr., on May 28, 1929.

In witness whereof, said party of the first part has hereunto set his hand and affixed his seal, and the said Jack Spalding,

60 Jr., and said Atlanta Trust Company, as showing their consent and unanimous agreement to these changes, have also signed the same, and day and year first above written. All done in three sets.

[SEAL] (Signed) JACK J. SPALDING.

[SEAL] (Signed) JACK J. SPALDING, JR.

ATLANTA TRUST COMPANY,
Trustee.

[SEAL] By (Signed) J. B. WHEAT,
*Assistant Secretary.*

[CORPORATE SEAL]

The Citizens & Southern National Bank, of Atlanta, hereby accepts the foregoing trust, subject to all of the terms, conditions and provisions thereof and with all the rights, powers, and duties specified therein. It acknowledges receipt of the trust estate therein set out from the former Trustee, the Atlanta Trust Company.

This August 29, 1934.

THE CITIZENS & SOUTHERN NATIONAL BANK,
*Trustee.*

[SEAL] By (S) L. H. PARRIS,
*Assistant Trust Officer.*

COPY

GEORGIA,
*Fulton County:*

This agreement, made this 29th day of August 1934, between Jack J. Spalding, party of the first part, and The Citizens
61 & Southern National Bank, a national banking association with an office in Atlanta, Georgia, as party of the second part, witnesseth:

Whereas, on the 15th day of June A. D. 1925, the first party hereto executed an agreement with the Atlanta Trust Company, a corporation of said County, in three sets, one of which is hereto attached; and

Whereas, Jack J. Spalding, Jr., executed an agreement with the said Atlanta Trust Company on the 28th day of May 1929, an original or copy of which is also attached hereto; and

Whereas, on the 24th day of August 1934, the party of the first part, and the said Atlanta Trust Company and Jack J. Spalding, Jr., executed an agreement in three sets, one of which is attached hereto, in and by which said last agreement said Atlanta Trust Company resigned as Trustee under said attached agreements, and the party of the second part hereto was appointed successor in the trust embraced by the said agreements attached hereto; and

Whereas, in paragraph 12 of said agreement of the 24th day of August 1934, attached hereto, it is expressly provided that party of the first part may by written conveyance, from time to time, and by his last will and testament, make additions to the property hereby conveyed, and when made the same shall be subject to all the provisions, terms, and conditions contained in this conveyance the same as if originally embraced therein;

Now, therefore, the first party hereto has con-
62 veyed, and does hereby confirm and convey, to said second party, The Citizens & Southern National Bank, as Trustee,

the following property, to wit: (Market value appraised by Robinson-Humphrey Company for me.)

| Par value | Issuing authority, interest rate, maturity, and numbers | Market value | Accrued interest to 8/9/34 |
|---|---|---|---|
| $10,000.00 | City of Atlanta, 4½'s due 7/1/50, Nos. 770-779 (inc.) | $11,700.00 | *$80.56 |
| 10,000.00 | City of Savannah, 4½'s due 2/1/59, Nos. 215, 1088, 1104, 1653-1656 (inc.), 1892, 1893, and 2243 | 11,900.00 | 35.00 |
| 10,000.00 | Coastal Highway of Georgia, 4½'s due 5/1/46, Nos. 872, 873, 883-889 (inc.) and 891 | 10,900.00 | *147.50 |
| 4,000.00 | Rabun County, 5's due 11/9/55, Nos. 12-15 (inc.) | 4,480.00 | 32.22 |
| 5,000.00 | Thomas County, 5's due 6/1/48, Nos. 441-445 (inc.) | 5,575.00 | 61.11 |
| 5,000.00 | Richmond County, 4½'s due 1/1/50, Nos. 277 and 280-283 (inc.) | 5,475.00 | 36.25 |
| 44,000.00 | | 50,030.00 | 392.64 |

*Coupons clipped and retained by party of the first part from above bonds, as follows:

| | | |
|---|---|---|
| $10,000.00 City of Atlanta—to Jan. 1, 1935 | | $225.00 |
| $10,000.00 Coastal Highway—to Nov. 1, 1934 | | 225.00 |
| | | 450.00 |
| Market value above bonds | $50,030.00 | |
| Accrued interest to Aug. 29, 1934 | 392.64 | |
| | 50,422.64 | |
| Less coupons retained | 450.00 | |
| Total net of gift | 49,972.64 | |

63 The said party of the second part hereto as such Trustee, and its successors, shall own, hold, administer and dispose of the principal of said property, and the incomes and profits therefrom as specified in said agreement annexed hereto, dated the 24th day of August 1934, subject to all the terms, provisions and conditions, and with all the rights, powers, and privileges contained in said agreement, as fully and completely as if said securities had been originally conveyed by said agreement.

Witness the hand and seal of the party of the first part, the day and date aforesaid. Executed in three sets.

(Signed) JACK J. SPALDING. [SEAL]

The Citizens & Southern National Bank, as Trustee, hereby acknowledges receipt of the securities enumerated above, and accepts the trust thereof under the terms of said trust agreement annexed:

This August 29, 1934.

THE CITIZENS & SOUTHERN NATIONAL BANK,

*Trustee.*

[SEAL] By (Signed) T. C. ERWIN,

*Vice President and Trust Officer.*

(Bank Seal)

64 *Exhibit B to amendment*

COPY

DECEMBER 30, 1924.
JJS–mck

MRS. SUZANNE SCHROEDER,
*1200 Jefferson Street, Albany, Georgia.*

MY DEAR DAUGHTER: Hughes has made an arrangement with the Atlanta and Lowry National Bank to release you from all the indebtedness you owe it, being the amount owed by the Albany Oil Mill, of which you were formerly a partner, upon the payment of $10,000 in cash. This will have to be done tomorrow.

I have agreed with him to make an advance to you of this amount and it will be charged against anything that you will receive out of my estate, unless before I die I make similar advances to the other children.

I enclose herewith a note to evidence this advance and as you will see it does not draw any interest, and is payable only on demand.

The Bank explicitly refused to release Billy for this amount. They wanted $10,000 more to release him, which was out of the question, especially in view of the fact that he would still be liable to the Bank at Albany and on the notes for the purchase of the mill.

Affectionately your father.

65 *Exhibit C to Amendment*

COPY

JUNE 16, 1925.
S–mb.

MRS. SUZANNE SPALDING SCHROEDER,
*Whitmire Cottage, St. Simons, Ga.*

MY DEAR DAUGHTER: On June 15th, 1925, I created a trust with the Atlanta Trust Company in favor of you and your children, the same having been executed in three original sets. I enclose you herewith one of these sets to be kept by you. One is kept by the Trust Company, and the other is kept by me.

This fund is around $50,000.00 and as at present invested bears eight percent, making $4,000.00 per year. The Trust Company's commission of 2½% is $100.00, leaving $3,900.00, which I hope will be net to you. I do not know of any taxes or charges that would come against it; but in order to be on the safe side I have advised the Trust Company that it should send you $300.00 per month on or before the 10th day of each month during the year,

and at the end of the year, to pay you over the balance of the net fund remaining on hand in each year.

This will give you $300.00 a month for living money, and you will see that after your death, it will be administered and paid over to your children until the youngest becomes twenty one years of age, when it will be equally divided between them.

66 If any misfortune should take off the five fine children you now have and you have no others left at your death, it will then be in your power to provide in advance by making a willing disposing of the corpus of this fund to whomsoever you please.

I have made an identical trust, with the same kind of stock, for Jack, and have also made a trust in favor of your mother, but with different stocks from those you and Jack get. I have not arranged for Hughes yet, but expect to do so.

It is important that you keep the Atlanta Trust Company always correctely advised as to your port office address.

Tell Spalding I got his fine letter and am very proud that he writes so plainly. I believe he writes the plainest hand of any of the grandchildren and composes a good letter.

We are all looking forward to the boys being here, I believe it is Monday morning, the 22nd inst., on their way to camp.

Nancy is up in arms about Bob getting poisoned with ivy; she now has him in St. Elizabeth's Hospital and is writing that the doctor is giving out alarms about his kidneys. I am in hopes that it will not amount to a great deal and that Bob will be able to join them, if not in the beginning, a little later on.

We are all pretty well here, keeping in mind your mother's age.

67 Hughes and Bolling are over in Athens; will be back, tomorrow.

I hope Billy is getting straightened out at Albany and that he may find something that suits him and that will prove profitable.

With love to all,

Affectionately your father,

Enc.

*Exhibit D to amendment*

COPY

JUNE 16, 1925.

S-mb.

Mr. JACK SPALDING, Jr.

*23 West 82nd St., New York City.*

MY DEAR SON: On January 15th, 1925, I created a trust with the Atlanta Trust Company in favor of you and your children. It was executed in three original sets and I enclose you one of these.

to be kept by you. I am keeping one and the Trust Company has the other.

This stock is worth around $50,000.00, is now drawing eight percent, which provides $4,000.00 a year, less commissions and expenses.

I have suggested to the Trust Company that it mail you check by the 10th day of each month for $300.00 and that each year in the month of December it pay over to you any balance above this remaining from the net income of this trust fund.

68 This will give you $300.00 a month net and a little over, and you will have to live on this.

You must keep the Trust Company accurately advised as to your correct address in order that the checks will reach you.

I will discontinue the monthly remittances, since I have created this trust fund to take care of the same.

You will see that in case of your death the trust continues for the benefit of your children, and that if unfortunately you should see that you are not going to leave any children, you will have a right to make a will and dispose of the corpus of the fund as you please.

I call your attention also to the fact that you cannot anticipate this fund, put any charge on it, or dispose of it in any way, and that any attempt to do so will result in the Trust Company's stopping the sending of incomes to you, and that they will have to be turned to your child, or children, or their guardian.

This is done for your protection in order to absolutely insure against these incomes ever being lost.

I am making identically the same trust in favor of Suzanne, with the same sort of stock.

I am also making a trust substantially the same, in favor of your mother, but with different stocks. I intend to take care of Hughes for about the same amount, but have not yet done so.

69 Nancy has been writing about Bob's condition, both to me and your mother. I am writing her fully on this subject today.

It has been about forty days since we were in Washington together and when it was agreed you would go and see a doctor and have yourself thoroughly checked up. Your mother tells me she offered to pay for this expense. I cannot understand why it is you have not done this. It looks like a grown man of your age certainly ought to be able in a great City like New York to get an intelligent check up as to his health in forty days. It is incomprehensive to my mind that you do not attend to this matter.

It looks to me like you ought to have your urine, your blood, your blood pressure, your eyes, teeth, and anything that might

account for your loss in flesh, thoroughly looked into and have it determined if there is anything out of fix.

I do not know anything else that I can do about it, as I am not a doctor myself.

We are all pretty well here and certainly hope that Bob will be in shape to come down soon to the camp.

With much love to all of you, I am

Affectionately your father.

Enc.

70 *Exhibit E to amendment*

COPY

ATLANTA, GEORGIA, *August 28, 1934.*

MRS. SUZANNE SPALDING SCHRODER,
*Atlanta, Georgia.*

MY DEAR DAUGHTER: In making additional gifts, estimated by me at $50,000 to each of my three children, I am advising that $19,400 of your gift is in the shape of a deed from me to you to the property at No. 160 Rumson Road. The remainder of the gift to you is represented by bonds of the present market value of $30,544.38. This aggregates $49,944.38, which is as near as I can make it, computing the value of bonds and interest.

I am making this gift, because you have five children, one a grown daughter and the others at ages calling for increasing yearly expenditures. While your husband is a splendid fellow and a fine businessman, the World War crushed his prospering business and forced him to accept a salaried position.

These bonds have been deposited with The Citizens & Southern National Bank, Atlanta, as Trustee, and are correctly set forth in the accompanying paper, in which the Trustee acknowledges receipt of them. It is the successor of the Atlanta Trust Company, as Trustee.

71 The deed to 160 Rumson Road has been duly executed, stamped, and is being recorded. When this is completed, it will come to you.

I am also enclosing all of the deeds and abstracts touching 160 Rumson Road, which you left with me.

You should take the original agreement which you have between me and the Atlanta Trust Company, creating the trust, dated June 15, 1925, the supplemental agreement, a copy of which is enclosed, dated August 24, 1934, changing the Trustee, and the

agreement of August 29, 1934, under which I deposited the above-mentioned bonds with The Citizens & Southern National Bank, and fasten them all securely together, so that you will have your file complete.

I wish to suggest that, as a part of prudence, you save up the increased income from this gift so as to meet emergencies that may arise in the future.

With much love, and wishing you a happy and prosperous life, I am

Affectionately, your father.

JJS:J.

Encl.

72 *Exhibit F to amendment*

COPY

ATLANTA, GEORGIA, *August 29, 1934.*

MR. JACK SPALDING, JR.:
*The Sulgrave Hotel,*
*Park Avenue at 67th Street, New York City.*

MY DEAR SON: Supplementing the trust created by me in your favor with the Atlanta Trust Company, as Trustee, in 1925, I wish to advise:

That The Citizens & Southern National Bank, Atlanta, has become the successor of the Atlanta Trust Company in this trust, as shown in the enclosed agreement of August 24, 1934. This also embraces as you will see, the additions you made to this trust in 1929.

I am also enclosing you a conveyance, dated August 29, 1934, from me to the new Trustee, The Citizens & Southern National Bank, of an additional gift of the present market value of $50,000, the same being placed under the trust as heretofore created.

I am making this gift at this time, along with others of like amount to the other two children, because of the general depression and lack of employment over the country, and because Bob is about grown, will finish his college course next year and you will have to be helping him get a start in life.

73 I believe it is prudent to keep the situation to yourself.

With much love and best wishes for your future success and prosperity, I am

Affectionately, your father.

JJS:J.

Encl.

*Exhibit G to amendment*

ATLANTA, GEORGIA, *August 25, 1934.*

Mr. HUGHES SPALDING,
*Atlanta, Georgia.*

MY DEAR SON: I have executed this day to you deed to the property at 2002 Peachtree Road, as part of a gift of $50,000. The deed has been stamped and is being recorded. In this connection, I am enclosing you a letter which applies to the additional land you are using and not embraced in the deed.

This leaves a balance of $15,839.87 to bring your gift up to $50,000. Under the agreement between you and me, this is to be applied to certain indebtedness of yours, and I am ready to draw checks to you for this purpose whenever you request it.

I am making similar gifts to your brother and sister. All of them are made because of the general depression in business; and
especially in your case because of the falling off in incomes
74 from the law practice, the bringing up of your five children, the constant increase in expense of their support and maintenance, and business misfortunes you have encountered.

With much love; and hoping you may have prosperity in health and fortune in the future, I am

Affectionately, your father.

JJS:J
Encl.

In United States District Court

*Defendant's answer to plaintiff's amendment of March 15, 1944*

Filed April 13, 1944

Comes now the defendant in the above stated matter by his attorney, T. Hoyt Davis, United States Attorney for the Middle District of Georgia, and in response to the amendment filed by plaintiff on March 15, 1944, answers as follows:

1. In response to paragraph six as amended, the defendant admits that the deficiency resulted as indicated from the two trust instruments referred to as exhibit A of paragraph six as amended, all other allegations in said paragraph six as amended are denied.

2. Defendant admits that the decision of the United States Supreme Court in the case of Helvering v. City Bank Farmers Trust Company, 296 U. S. 25, was called to the attention of Mr. Jack J. Spalding and that he was thus informed that the property subject to the trust instruments was still in his estate;

any other allegations in paragraph 25 as amended are denied.

This 13th day of April 1944.

T. HOYT DAVIS,
*United States Attorney.*

By CHAS. W. WALKER,
*Assistant U. S. Attorney.*

A copy of the foregoing answer to the amendment has been this day delivered to Spalding, Sibley, and Troutman, attorneys for plaintiff.

CHAS. W. WALKER.

In United States District Court

*Stipulation*

(Filed April 13, 1944)

It is stipulated and agreed that, after the Court has announced its decision on the question of what transfers, if any, are includible in the estate of plaintiffs' testator, counsel will make the necessary calculations and agree on the amount of the refund, if any, resulting from such decision, and that if counsel fail to agree, either party may introduce additional evidence on such question and the Court will thereafter decide such question.

SPALDING, SIBLEY & TROUTMAN,
FURMAN SMITH,
*Counsel for Plaintiffs.*

CHAS. W. WALKER,
*Counsel for Defendant.*

76 In United States District Court

*Statement of evidence*

*Objections to evidence*

MR. KITCHEN. We object to any evidence and all evidence as immaterial, because we think the Government's case is in the pleadings.

The COURT. Would you like to object to all this now and not enter any further objections? I want to get all the facts in.

Mr. SIBLEY. I would like to indicate that we object to a certain line of testimony and let that go in.

Mr. KITCHEN. We object to any conclusions which require a medical knowledge or knowledge beyond our ken, and a great

many facts—We object to any evidence as immaterial in the case. We offer this for your use (referring to Request for Admissions), if you want to put this in.

Mr. SIBLEY. We may refer to it. We will take it in whole or in part later. We reserve it.

Mr. SMITH. I think that as a matter of law those facts are admitted, although you don't admit those facts are true. We would like the record to show the facts are true.

Mr. ERLE COCKE, a witness for the Plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. JOHN A. SIBLEY:

Q. Mr. Cocke, will you give your name and initials to the reporter, please—A. My name is Erle Cocke.

Q. Mr. Cocke, where were you reared?—A. I was reared down in Southwest Georgia; Dawson.

77 Q. Have you ever lived here in Macon?—A. Yes, sir; I lived in Macon about four years, 1928 to 1932.

Q. What were you doing here?—A. Sales Manager of Cotton States Fertilizer Company.

Q. Where are you now living?—A. In Atlanta, Georgia.

Q. What is your position?—A. Executive Vice President of Fulton National Bank.

Q. How long have you had that position?—A. I have been with the Fulton National Bank since June 1938, and have been Executive Vice President since August 1942.

Q. Did you know Mr. Jack Spalding during his life?—A. Yes, sir.

Q. How long had you known him?—A. I had known him over a period of years; I would say eight or ten years.

Q. Do you know whether or not, there was an acquaintanceship between your family and Mr. Spalding's family?—A. Yes, sir; my father and Mr. Spalding have been friends over a long period of years.

Q. Have they had any special association together, from the facts you recall or from facts you have gotten from Mr. Spalding?—A. Yes, sir; I remember distinctly that they were delegates to two Democratic National Conventions together. Particularly I recall both of them mentioning the other to me in the 1896 Convention.

Q. You are speaking now from tradition, which you
78 learned from your family, rather than your personal knowledge?—A. That's right. That is information from my father or from Mr. Spalding.

Q. In 1896 what particular thing occurred that brought the families close together?—A. If I remember the details of it, Mr.

Spalding was probably Chairman of the Georgia Delegation, and they evidently appreciated his services very much, and he was presented with a gold-headed walking cane, and I think my father made the presentation to him.

Q. Did you attend the 1936 Democratic Convention?—A. Yes, sir.

Q. Where was that held?—A. Philadelphia, Penn.

Q. Were you a delegate there?—A. Yes, sir.

Q. Was Mr. Spalding a delegate?—A. Yes, sir.

Q. Did you have an opportunity to see him in Philadelphia on that occasion?—A. Yes, sir; I recall I went up on the train with him and saw him after our arrival in Philadelphia, and I recall being with him on at least three different occasions during the convention and general conferences of the delegation, which was rather extended on the first full day after our arrival there, and I remember talking with him on another occasion in the hotel lobby during the convention, and remember talking with him on the floor of the convention.

Q. Did you attend the meetings of the convention?—A. Yes, sir.

Q. How long would those meetings hold; just speaking generally?—A. Well, I would say the convention opened around,
79 10:00 to 10:30, not later than 11:00 o'clock in the morning, and they generally stayed in session during that day to the night sessions. They were not extended sessions, but were full days.

Q. Did he stay through these sessions?—A. I am certain he did. On one particular day I am positive about it, and he was present with the delegation all the time, and I would say he stayed through all the meetings.

Q. Was he an active member of the delegation?—A. Yes; he participated in the affairs, participated in the discussions.

Q. When you had meetings and conferences with the delegates—or did you have any one or more?—A. Yes, sir; there was one particularly long session in which the entire delegation was present. Then there were certain committees and groups.

Q. Did he attend the one in which they were all in session?—A. Yes, sir.

Q. Do you know whether or not he participated in the deliberations?—A. Yes, sir.

Q. Mr. Cocke, if he was born in 1856—just assuming that is correct—and the convention was in 1936, how old would he have been?—A. Eighty years old.

Q. From your association and knowledge of him then and on other occasions, how would you consider his health compared with the average man of that age?—A. I would say, bearing in mind

his years, that his health was remarkable. In other words,
80 his activity would certainly average better than most men of his years.

Q. What would you say about his mental vigor?—A. I think he was excellent mentally.

Q. Did he give the impression of a man who was interested in the things of life?—A. Intensely so.

Q. I will ask you whether or not in August after that convention you attended a banquet or dinner for the delegates who attended the National Convention, in Atlanta?—A. Yes, sir; the dinner was given by Col. Spalding to the delegates and electors at the Biltmore Hotel.

Q. Was that quite a large dinner?—A. Yes, sir.

Q. Refresh your recollection from this issue of the Atlanta Journal of August 16, 1936, and state whether or not that is an account of that dinner?—A. Yes, sir; this is an account of it.

Q. Is that a fair statement of the dinner and of Mr. Spalding's participation and activities in it?—A. Yes, sir; I would say it is.

Q. Did he deliver an address on that occasion?—A. Yes, sir.

Q. I will ask you if he stood or sat or reclined?—A. He stood and made a very aggressive address, I would say. His thoughts were to the point and emphasized strongly.

Q. Was it clear?—A. Clear and distinctly stated; yes, sir.

Q. Is that photograph there a picture of Mr. Spald-
81 ing?—A. Yes, sir; that is a good likeness of him.

Mr. SIBLEY. This is an issue of the Atlanta Constitution of August 16, 1936, which I think contains his speech in full, together with a picture.

Cross-examination by Mr. CHAS. W. WALKER:

Q. If he was 80 in 1936, going on your same assumption, then in 1937 he would be 81, wouldn't he?—A. Yes, sir.

Q. You don't purport to know anything about the details of his health? You just knew him at the Convention?—A. No, sir; just personal observation; seeing him.

The COURT. I take it that the Government objects to all of that testimony as irrelevant?

Mr. WALKER. Yes, sir.

Lieut. Comdr. ULYSSES E. SIBLEY, a witness for the Plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. JOHN A. SIBLEY:

Q. Will you please give the reporter your name?—A. Ulysses E. Sibley.

Q. Where do you live?—A. I live in Milledgeville, but I am temporarily stationed in Charleston, S. C., in the Navy.

Q. What is your profession?—A. Law.

82 Q. Where are you now?—A. I am stationed at the headquarters of the Sixth Naval District, Assistant District Security Officer, Charleston, S. C.

Q. What is your rank?—A. Lieutenant Commander, U. S. N. R.

Q. Have you ever held a position as counsel or special counsel for the Government?—A. I have.

Q. Between what years?—A. Between 1935 and 1941.

Q. What was that?—A. I was the special attorney—It's a long title—I was Special Attorney for the Attorney General to Acquire Lands in Georgia.

Q. Was that in acquiring these mountain lands, largely?—A. Mountain lands, and towards the end of the 1941 they were acquiring a great deal of camp sites, like Camp Stewart. They had just started on that.

Q. Commander Sibley, did you know Mr. Jack Spalding?—A. I did.

Q. How long had you known him?—A. It is more or less embarrassing—I expect a quarter of a century.

Q. Did you see him at frequent intervals?—A. Yes, I did; from 1913 on more frequently. Hughes Spalding was President of our law class, and I used to go to Atlanta from time to time, and I always called on Hughes, who was a town boy that had a country attribute and he would always associate with us and would always take me in to see his father when he was with King & Sibley and King, Sibley & Underwood. Every time I went to Atlanta I always called on Hughes.

83 Q. Were you a member of the Georgia Delegation to the Democratic National Convention in 1932?—A. I might say, if you will pardon me, I knew Mr. Spalding more intimately from 1913 to 1917 because I was secretary to the Court of Appeals Chief Justice Fish, and I was constantly seeing him then from time to time. And to your other question, I was a delegate to the National Convention in 1932.

Q. Was Mr. Spalding a delegate to that Convention?—A. He was.

Q. How were your seats arranged with respect to that Convention; who sat together?—A. Mr. Spalding and Mr. Clark Howell, the late Clark Howell, who was editor of the Constitution, and myself. We were more or less contemporaries.

Q. Who was nominated at that Convention for President?—A. Roosevelt.

Q. Would you describe that Convention and its proceedings as a very quiet, sort of cut and dried affair?—A. Of course, I had never attended one before. I think Mr. Clark Howell, who was a

cousin of mine, had attended all of them, and I don't know how many of them Mr. Spalding had been to, but they indicated it was the liveliest thing they had ever attended. For me it was the liveliest occasion I have ever seen before or since.

Q. Would it be too strong to say it was strenuous?—A. It would not be a bit too strong. That is modestly speaking. It was the biggest circus you have ever seen and you are part of the circus.

Q. Did it ever border on turbulence?—A. Well, it
84 was mob scenery, you might say, in its enthusiasm and zeal. Will Rogers said, in addressing the Republican Convention—he explained the Democrats' enthusiasm by saying the Republicans knew they were going to attend the Inauguration and the Democrats knew that was the only time they would ever meet together, but it was the most excitable occasion I had ever witnessed.

Q. How did these sessions run in time?—A. They ran a week and took recesses from time to time.

Q. Was the day or night when you would meet?—A. We would meet at nights, at about 7 o'clock in the evening, and it would shock me when I went out afterwards and see the sun up, because it was in the auditorium, which was lighted all the time, and we would hold sessions all night long.

Q. During those night sessions did Mr. Spalding stay by the sessions all the time?—A. All the time.

Q. Did he take an active interest in what was going on?—A. He attended, as I recall, the caucus. I think Senator Russell headed the delegation on Georgia resolutions, and Mr. Spalding addressed the caucus at that time. As I recall, his statement prevailed, his motion prevailed.

Q. Did he make a talk on that occasion?—A. He made a talk, and he always stood. During the Convention he never took advantage of any age. He stood on every "Star Spangled Banner" and every time "Anchors Away" was played he waved his stick, and you would think he was as young as anybody there, he and Mr. Clark Howell.

85 Q. Assuming that he was born in 1856, and that the Convention was in 1932, which we know, what would have been his age at that time?—A. He was 76 years old in 1932.

Q. Now, for a man that age, from your observation and contact with him, would you say his mental and physical vigor was above or below normal?—A. It was above. He and Mr. Howell were together, and one other man that was outstanding was Mr. Spence Grayson. He even took the banner and waved it around. He was a delegate.

Q. I will ask you to look at this paper here and the photograph right there. This is dated June 29, 1932 and is headed "Georgia

Delegates Display Roosevelt Banner," and then on June 30, 1932 also, and I will ask you to identify that photograph there. Who is that?—A. The second one of June 30, 1932, with the hat on, is Mr. Spalding.

Q. Who is that standing?—A. I am standing on his left.

Q. State where that was taken.—A. That was taken in the Chicago Auditorium, where the Democratic Convention was being held in 1932.

Q. Do you remember whether or not the delegation in 1932 presented Mr. Spalding with a cup in recognition of his services to the delegation?—A. I don't remember that; don't recall. They left from Atlanta, and I went by myself ahead of them on a railroad pass, because I could ride free, and in the depression that counted, but I met the delegation when I was up there.

86 Q. I would like to identify at this point the article from the Atlanta Constitution of July 10, 1932, headed, "Jack J. Spalding Paid Tribute on Cup Given by Delegation."—A. Yes, sir; I remember it now, after refreshing my recollection on it.

Cross-examination by Mr. CHAS. W. WALKER:

Q. The convention you refer to was in 1932?—A. June 1932; yes sir.

Q. When he was 76 years of age?—A. That's right.

Q. Then in 1937 he would be 81 years of age?—A. That's right.

Mr. WALKER. We object to that testimony on the same ground.

Mr. CHAS. J. BLOCH, a witness for the Plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. JOHN A. SIBLEY:

Q. Did you know Mr. Jack Spalding?—A. I did.

Q. Were you at the 1932 convention?—A. I was a delegate at large from the State of Georgia to the 1932 convention.

Q. Did you have an opportunity to see him then?—A. I did.

Q. Did you come in contact with his activities?—A. Yes.

87 Q. From your observation of his activities and interest in the convention, assuming that he was then 76 years old, would you say that in mental and physical vigor he was above or below the average person?—A. I would say he was above the average person.

Q. Did he take an interest in the proceedings then?—A. He did. I recall that Edgar Dunlap and I were rooming together at the old Auditorium Hotel, and I believe Mr. Spalding was stopping at the same hotel; I'm not sure of that, but I do recall having meals with him on two or three occasions there at the hotel, and I recall that he and Edgar and I had our pictures taken together

at one time, and that we were walking back from the stadium trying to find a taxicab. I recall the caucus that Commander Sibley spoke about and my recollection is that caucus was held at the Auditorium Hotel on the late afternoon that we got there, and he was very active in that caucus. When some matters came up that he wanted to talk about he talked about them.

Q. Did Mr. Spalding give a dinner for the delegates in 1932?—A. My recollection is that he gave a dinner the night before we left Atlanta, at the Capitol City Club. It was on Friday night, is my recollection, and we left Atlanta the following Saturday afternoon. The day after the Saturday afternoon, I think if you will look in the papers you will find a picture taken of him on the back of the train as they were leaving.

Mr. WALKER. We will make the same objection.

Q. I will get you to look at these. Here seems to be an
88 invitation of Mr. Spalding sent out in 1932. Refresh your recollection and see whether or not that is the invitation.—A. That is the invitation for Friday, June 24, 1932, sent out on June 10th. I received one of them.

Mr. HUGHES SPALDING, one of the Plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. JOHN A. SIBLEY:

Q. Mr. Spalding, was the late Mr. Jack J. Spalding your father?—A. He was my father, Mr. Jack Spalding.

Q. Where was he born?—A. Mr. Spalding was born in Morgan Field, Union County, Kentucky, on August 29, 1856.

Q. When did he come to Atlanta? You have to speak, of course, from family tradition?—A. Mr. Spalding came to Atlanta to practice law in January 1882. He practiced there for a few years in the old James Block Building, alone, without any partnership or association. There were three or four occupied those little rooms there, among whom was Mr. Coolidge, who was a court reporter there. Woodrow Wilson was one of them in Atlanta at that time. He afterwards formed a partnership on January 1, 1885, with Pat Calhoun and Alex C. King. So the name of the partnership beginning in 1885 was Calhoun, King & Spalding.

Q. Do you remember, as a matter of information, whether the names were arranged in that order; do you recall that?—
89 A. No; I don't remember that. I think they were all born the same year; I know they were.

Q. Is the succession of that firm still in existence?—A. That firm has had continuous existence down to the present time. It is now known as Spalding, Sibley & Troutman.

Q. How long have you been a member of the firm?—A. I started practicing law in June 1910, when I graduated from the law school at the University of Georgia, where Mr. Spalding insisted to me that I enter to take a course in politics. I thought I would go into the office with him. That was my idea until I graduated, and he said he didn't want any beginners up there; they would be worth something before he wanted them. So a classmate of mine at the University, Dan MacDougald, and I started practicing law together in June 1910. Judge Underwood was a member of the firm at that time. About 1914 they invited me to come up and become an associate, which I did. Judge Underwood, directly after that, was made one of the Assistant Attorney Generals of the United States, and went to Washington, and then Mr. MacDougald came up to the firm at that time. That was in 1914.

Q. Did the firm enjoy a rather broad practice?—A. The firm enjoyed a very broad practice, everywhere from federal equity cases to answering garnishments. Judge King went on the bench of the United States Circuit Court—No; I am getting ahead of myself. Mr. MacDougald and I went to the Army in the last War and you came up, you remember, to scotch for us while we
90 were gone, and Mr. Spalding and Judge King liked you so well they insisted you remain.

Q. I had not heard that, but I am glad to get it in the record.—A. (Continuing.) Judge King, shortly after the last War, became a member—he was appointed by, I think, President Wilson—a member of the United States Circuit Court of Appeals for the Fifth Circuit, and the firm's name was changed to Spalding, MacDougald & Sibley.

Q. What was Mr. King prior to his appointment on the bench?—A. He was Solicitor General of the United States.

Q. During that period of time after Mr. King withdrew and became Solicitor General of the United States, who did Mr. Spalding have in the firm to help carry on the practice?—A. You mean after Judge King withdrew?

Q. After Judge King withdrew; yes?—A. Well, there was Hughes Spalding and Dan MacDougald and John Sibley and Haines H. Hargrove.

Q. Were they all comparatively young at that time?—A. They were all comparatively young at that time.

Q. During that period of time was Mr. Spalding able, with these young men, to continue to practice and hold the clients?—A. Mr. Spalding was very active himself. He not only headed up the whole outfit, told us what to do and how to do it and when, but he actively took part in every tough litigation, such as the lawsuit between the Coca-Cola Company and the Coca-Cola Bottling interest, our firm representing the Coca-Cola Bottling inter-

91 est, which was successfully wound up from the viewpoint of the bottlers. Also he put over the merger of all of these power companies in North Georgia into the Georgia Power Company. It was out of that that he and Judge King—we were not partners at that time, unfortunately—he and Judge King, instead of taking a thirty thousand dollar fee in cash, took a million dollars worth of common stock in the merged Company, which they afterwards split for a million dollars. That was the foundation of Mr. Spalding's fortune and also Judge King's fortune, outside of practicing—saving. He was also, along about this time, in a very important lawsuit where an attack was made upon the merged corporation of Georgia Power Company, and he was very active in everything, not only law. He was always for the continuity of our firm; he did not think the firm ought to die and go out when he and Judge King quit, and he was trying to build men all the time; in every walk of life he was trying to build men, and that is what he set out to do; that was his idea.

Q. Mr. Spalding, aside from his law practice, was he a man of considerable business interests?—A. Mr. Spalding—I say it not because I am his son, and I think I say it without prejudice, that he was looked upon by all of the cotton mill interests which he represented, and was president at one time and was active in the Georgia Cotton Mill Association—He was looked upon as a very sound adviser. He was General Counsel of the old Atlanta National Bank, which is now the First National Bank. He was Director in the Georgia Power Company and General Counsel

92 for it. His advice was sought, not only on questions of law, but especially on questions of good judgment and good business policy and honorable, square and upright dealings. That was his forte, to a large extent. He was not only most active in these business matters. You will recall the very tough lawsuit that they had in Atlanta between Caldwell and Lee up at Nashville, Tennessee, where they tried to claim they had a contract to purchase the Atlanta Constitution for practically nothing, had a big lawsuit about that, and he was consulted about that. He actively participated in that case with you and Mr. Sibley. It was not only his knowledge of law, but his knowledge of men and his knowledge of conditions and his knowledge of economy. He was quite active in and interested politically; also he believed in good government. He wanted to have a say in what he thought was best for the State and for the people in the State. I think those things would be shown slightly in what the previous witnesses had to say.

Q. Mr. Spalding, how about his investment ability; his general insight?—A. He was looked upon as a very sound man with respect to investments. He did not believe in taking chances; he did not believe in gambling; he believed in buying things that were safe

and conservative and at the same time had a chance of enhancing, due to the growth of the community. He always had a great faith that Atlanta was the hub of the wheel and was destined to be a great city, and that the well-managed enterprises in the city, if handled properly and you had an interest in them, would look after your needs and interests.

93 Q. Returning to his civic activities outside of his law practice, do you know whether or not he had had a substantial part in the old Piedmont Exposition?—A. Mr. Spalding was one of the organizers of—not the old Exposition in 1887, although he was active in that—but he was one of the main springs, he and Mr. Clark Howell, in the Cotton States International Exposition held in Atlanta in 1895. As a matter of fact, he was General Counsel for the Exposition Company and made trips to Washington. At that time the Federal Government did not subsidize everybody then like they do now. They had quite a fight in Congress trying to get a small appropriation to help out the Cotton States Exposition, and he was head of the delegation that went there to help open the way where they could get some help by the Federal Government to assist in that Exposition. He was very much interested in it.

Q. Do you know whether or not he assisted the City of Atlanta in the acquisition of the City Auditorium?—A. Yes; he helped with the papers, in working out a plan whereby the City Auditorium was built and financed by the City, and also bought from old man B. T. Walker, who was a Confederate veteran, all of the land out there where the Exposition was held, and it was taken [illegible] what they called the Gentlemen's Driving Club at that time, now the Piedmont Driving Club, and the Exposition Company owned all that property, including the present Piedmont Park, and Mr. Spalding worked out a plan with the Exposition Company and with the City whereby that old Exposition property was given by the Exposition Company, a great part of it, at some con-

94 sideration, to refund some of that expense, and it was acquired by the City as a park.

Q. Do you know whether or not he was interested to help out the public schools of Atlanta in 1920?—A. The City of Atlanta was, you might say, busted. They didn't have money to pay the school teachers, and part of the public schools were going to have to be closed up. Major Cohen was at that time Editor of the Atlanta Constitution, and he came to Mr. Spalding and they got together a group of Atlanta citizens with the idea that it would be a calamity for the public schools to close, and they got up an underwriting of the citizens there of Atlanta to underwrite the Public School Systems and the teachers' salaries up to the extent of $500,000.00, and by reason of that and the City issuing script,

and the merchants, etc. guaranteeing—taking the script—the schools were kept open. I just accidentally ran across this thing in one of Mr. Spalding's old files. Here is a letter from Jack Cohen, dated January 21, 1927, thanking him for what he had done, and informing him that his obligation that he had incurred in that for $10,000.00 was satisfied. Then this article in the Atlanta Journal of October 20, 1926, in which it sets out the plan, and the article gives Mr. Spalding credit for his untiring efforts in working the matter out.

Mr. SIBLEY. Your Honor, I would like to read this into the record, because this is after the 1925 trust. The article is in the Atlanta Journal of October 20, 1926, and contains this statement:

"School officials and leaders among businessmen who have
95 made possible the solving of the school system's financial difficulties, came in for warm commendation Wednesday.

"Particular praise was given Jack J. Spalding, one of Atlanta's most prominent and most public-spirited attorneys, for his untiring efforts in working out the legal phases of the situation.

"Mr. Spalding personally drew the note on which $500,000 was obtained, and it was largely due to his personal prominence and to the confidence that they have in his sound legal judgment that the banks were persuaded to accept the paper.

"Not only did Mr. Spalding work untiringly in solving the legal problems connected with securing the money, but he also showed his confidence in the Atlanta public school system by personally indorsing the note in the sum of $10,000."

That is just an illustration of his public activities, as well as his legal activities, during that period of time.

Q. Mr. Spalding, going back just a moment on this to illustrate the groundwork basis of his life, did Mr. Spalding serve as County Commissioner of Fulton County?—A. Yes; Mr. Spalding was elected County Commissioner of Fulton County way back; and I think he did a great deal to develop the County in building roads. He was a great advocate of good roads, especially in the country, to bring people from the country to town and take advantage of the markets that were operated by the towns, so they could get there.

Q. I am going to ask you briefly at this point to give his
96 church life. Did he attend church services?—A. I want to say this: that Mr. Spalding was very active in church matters. He was very broad in his views with respect to religion and religious beliefs. He always expressed the opinion that what we needed not only here but elsewhere was more religion and more people subscribing to religion. He sought to impress this, of course, on his associates and friends and particularly his children, because he thought it was most important.

Q. How often did he attend services?—A. Mr. Spalding was a Catholic. He was proud of his family; called the Spalding family. They came to the Colony of Baltimore when that Colony was founded, shortly afterward, and he was the ninth generation of the name, apparently, in this country, and he held as a matter of pride, through all kinds of upsets, that his ancestors and himself had clung to the belief that they believed in, which was the Catholic faith, and he wanted that to go on. He wanted to make an object lesson of himself to say why it should go on and to set a good example, which he did. It was his practice to get up every morning about half past six and read what he used to call his Atlanta Bible, which was the Constitution. Then he would eat breakfast and go to church every morning at eight o'clock. That was on his way to the office. Then he would arrive at the office at about 8:30, where he worked until one o'clock. He always went home to lunch; left the office promptly at one o'clock and went back at 2:30 o'clock; then he left the office—in the early days when I was a great deal younger, and so was he, he insisted on the office staying open until six o'clock. No matter what happened, they had to
.97 stay there until six o'clock; everybody did, or they didn't stay at all. Later that was modified until five o'clock. That was his constant practice.

Q. Now, was he interested in the charitable institutions of the church?—A. Well, he was interested very much in the religion and the practice of religion, not only the Catholic religion, but all Christian religions, and also he thought if a man was a Jew he ought to be a good Jew. That's the way he was about religion. You ought to be something, and whatever you were you ought to be something which was a good one in his chosen religion. He thought that the best way to bring up good Catholics or good Methodists or good Baptists or Episcopalians, or whatever they might be, was through a process of education which began when they were young; and since their mothers' knee was no longer available apparently, he thought the schools should be a place where it would be inculcated. Therefore, he was very much interested in school, not only to educate the mind, but also to educate the moral side. Mr. Spalding, following along that line, made a very substantial contribution towards the building of the Sacred Heart Parochial School in Atlanta. He believed in places of worship and made contributions to those and helped not only those that professed his religion, but all kinds. He was a very generous man in that way.

Q. What I wanted to get at particularly was this Catholic Church Society. Did he take an active part in that?—A. Yes; we have in our church what we call the Society of St. Vincent of Paul. It was founded on the principles of a man

98 who was called the Paul and was afterwards canonized as a saint for devoting himself in his lifetime as a layman entirely to relieving the poor, and especially the galley slaves, and that has gone down as a society in his name, and the sole purpose of it is to relieve the poor. It is not to be done by organized charity, but is to be done by you personally.

Q. Did Mr. Spalding organize that?—A. He organized that society in Atlanta, and he organized it all over Georgia and also all over Florida. He made trips in his automobile for the purpose of organizing that society, and he continued up to the time of his death to see that the work was carried on. He was Vice President of this Section of the Society in the United States, in charge of Georgia and Florida.

Q. Was he ever head of the Local Conference in Atlanta?—A. Oh, yes; at the time of his death he was.

Q. What time did that meet?—A. Met every Monday night, and he was there every Monday night, even up to the summer of 1938.

Q. Did he have any special views with respect to his own wealth; any limitations on it? Had he ever expressed any that you know of?—A. Mr. Spalding always expressed the view that his personal opinion was that no man should be too rich, and his idea of being too rich—this was his personal view; he did not try to force it on anybody else—no man should be worth more than a million dollars; there just was not any need of being worth more than one million dollars, and he would often announce, not only to me, but to all of his friends, whenever his estate that he owned got up around a million dollars that he
99 was going to give it away; that he did not intend to die owning more than a million dollars. He considered the advisability of less than that, but that was his announced principle, and not only his announced principle as far as he was concerned, but it was his practice; he actually did it.

Q. I want to turn a moment to his family life, if I may. What was the number of his children?—A. There were three of us. I was born in 1886; my sister, Suzanne, was born in 1888, and my brother, Jack, was born in 1890. My father said he would do almost anything in reason for any of his children, but they had to take education. That was something that could not be taken away from you; that anything else we had could be taken away from you, but your education could not be, so he was very determined that whether we wanted to be educated or not, that we were going to be educated, and he saw to that. I got through my law education in 1910 at the University of Georgia, and graduated in 1908 in the arts course of Georgetown University in Washington, D. C. My sister had finished her schooling about

1909. My brother went to Georgia Tech and he finished his schooling in 1911, with a degree of mechanical engineering.

Q. I want to ask you whether or not, in making gifts to the children, he had any principle respecting equality between the children?—A. Yes; Mr. Spalding used to say that Georgia made the best will that any man could make, look after your wife and your children equally, and that was what should be done, and that was his policy always in making gifts. If he made a
100 gift to me or to any of the other children he always equalized it and gave the same to all, including my mother. That was his policy.

Q. When was the first gift that he made to you or to any of the children of any substantial amount?—A. Let me say this: Mr. Spalding believed in early marriages, and as it looked like some of us were not in a hurry to get married, he put down a rule: If we got married before we were 25, he would give us $5,000.00; if we didn't, he didn't give us anything. All of us married before we were 25. I just did get in. That was my first gift. My sister got married in 1910. I married February 7, 1912.

Q. What, if anything, did he do after that time?—A. He said we ought to have a home. So he gave us each a home on West Fourteenth Street. The cost of those homes was $15,000.00. He gave those to us, I think, in 1911. He gave mine to me in anticipation of marriage. The house was finished though about the time I actually married and moved into it. He gave Suzanne the same thing, the house next door. The house and lot and all cost the same thing. My brother at that time was with Pennsylvania Steel Company and he started at the bottom. He was a foreman in a blast furnace with Pennsylvania Steel Company, and he didn't need any $15,000 to do that, so Mr. Spalding at that time didn't give him $15,000.00, and my brother wanted to come to Atlanta to work in that section and pick up the pieces. He thought he would like to go into Glover Machine Works at Marietta, just 18 miles from Atlanta. So father bought him $15,000.00 worth of stock in that and he went into business there.

161 Q. Was that about equal value of the cost of the home?—A. That was equal value.

Q. When was the next gift he made to the children; about when?—A. I think the next gift, as far as I can remember it, was in 1918. Mr. Spalding had bought a piece of property in Atlanta right next to George Muses', running between Peachtree and Broad Street, and he sold it along the first part of 1918, and out of the proceeds of that sale he gave each one of us $18,000.00 or its equivalent. I know he gave me a purchase money note on that property in the amount of $18,000.00, which was paid, and I think he did the same for my sister and the same for my brother. I know he

gave them the same, but whether it was in the form of a note I don't know. That was the next gift he gave us, and while he was making these gifts to us he gave mother certain stocks and things that equalized her with what he gave us.

Q. Mr. Spalding, were your father and mother happily married? Was the family on congenial terms always?—A. We were a very loyal and devoted family.

Q. Do you remember whether or not your father and mother celebrated their golden anniversary?—A. Yes; my father and mother celebrated their golden wedding, which was in December 1927. They gave a large reception at the Biltmore Hotel and celebrated their golden wedding. I remember it very well. It was a very impressive and touching thing to me.

Q. Do you remember, just prior to 1925, the financial
102 situation of your sister, Suzanne Spalding?—A. Well, I will have to start back prior to that. I will have to start about 1918.

Q. All right.—A. My sister's husband was William H. Schroder, who is now deceased. He was a very fine man and I thought was a good businessman.

Q. Is he dead now?—A. Yes. He was District Manager for the American Cotton Oil Company, with headquarters in Atlanta. He conceived the idea about the latter part of 1917 that he would like to go in business for himself. So he purchased from the American Cotton Oil Company, which wanted to dispose of the property at that time, an oil mill at Albany, Georgia, called the Albany Oil Mill, and he purchased that for a price which I have forgotten, he and my sister formed a partnership known as the Albany Oil Mill, and they went into the cotton oil mill business at Albany. My sister put everything she had at that time into the business. The War was at its height. The Government had contracts with the cotton oil companies to buy their output, and Mr. Schroder and my sister had contracts with the Government covering that season's crush of cottonseed for 1918, at a very high and fancy price. He had loaded up on cottonseed, which they acquired at a very fancy price. When the Armistice was signed in November 1918, the Government cancelled all the contracts. They had no provision like they do now. Just cancelled it. The price of cottonseed products declined 75 or 80 per cent and they were wiped off the map. My sister lost her home in Atlanta, which was sold, and the proceeds went to the then Atlanta National
103 Bank, where she owed a debt. She had also acquired a home in Albany, and that home was lost. She lost everything and then was liable on debts of $80,000.00. I remember these things very well because I handled them. She was threatened with suit by the banks, which insisted on putting pressure

on the family to pay them out. Mr. Spalding finally paid $10,000.00 to get her released, on a covenant not to sue her from the bank.

Q. Did she lose the $18,000.00 that her father had given her?—A. She lost $18,000.00, the home in Atlanta and the home in Albany and everything else she had except the five children. She still has those.

Q. So in 1924, during this period prior to 1925, she not only lost everything she had, including her home, but she was liable on notes?—A. She was liable on notes for $80,000.00 in addition.

Q. I will ask you what, if anything, your father did to get rid of that $80,000.00 liability?—A. He advanced or gave her $10,000.00, not a gift to her, but paid that to the bank in order to get a covenant from the bank not to sue her.

Q. Here is a copy of a letter dated December 20, 1934, addressed to Mrs. Suzanne Schroder, and that is your father's daughter. Would you mind reading that letter to the Court, showing that transaction?—A. This is addressed to "My Dear Daughter:"

"Hughes has made an arrangement with the Atlanta and Lowry National Bank to release you from all the indebtedness you owe it, being the amount owed by the Albany Oil Mill, of which
104 you were formerly a partner, upon the payment of $10,000 in cash. This will have to be done tomorrow.

"I have agreed with him to make an advance to you of this amount and it will be charged against anything that you will receive out of my estate, unless before I die I make similar advances to the other children.

"I enclose herewith a note to evidence this advance and as you will see it does not draw any interest, and is payable only on demand. Please sign this and return it to me promptly. This will let you keep your personal stocks, such as the Journal stock, Ice Company stock, and any other little belongings that you have. I will return the personal effects which you left with me and which I have in my safety box whenever a convenient opportunity arises.

"The Bank explicitly refused to release Billy——

Q. That is her husband?—A. That is her husband—"for this amount. They wanted $10,000 more to release him, which was out of the question, especially in view of the fact that he would still be liable to the Bank at Albany and on the notes for the purchase of the mill."

"This settlement is made upon the assurance of Judge Pottle that you are released from liability to the Bank at Albany. I understand also that if you are on any note whatever connected with the house in which you live, that the amount of the note is not for more than the real value of the house.

"I have your telegram that Judge Pottle is out
105 of town. I am going to call you up tonight from home, and if it is possible I would like him to wire me early tomorrow morning to the effect that the Bank there has no claim against you and that you will not be in danger of being liable on any amount for the home place above what it is really worth."

That was my sister's birthday

Q. What was her husband's financial condition at that time, in 1924, when that letter was written?—A. After the failure of the oil-mill business there, Mr. Schroder, for the Albany Bank which was one of the chief creditors, attempted to operate the mill for the benefit of the bank, so as to work the mill out of the debt. He thought that was his duty to do that, for which he drew a moderate salary; I think $200.00 a month, is my recollection. The cotton oil business was terrible and there wasn't any money in it at that time and the bank abandoned it. In 1924 they quit and he was without employment.

Q. What did he do?—A. With his wife and five children on his hands, he went down to Miami, Florida, where the boom was on down there, thinking he could recoup and make some money back. I think he went down there early in 1925, took his wife and children with him.

Q. At that time was he still subject to large obligations?—A. Yes; he was subject to very large obligations.

Q. And was he without any employment?—A. Without any employment and without any job.

106 Q. How many children did they have?—A. Five children.

Q. Do your remember the ages at that time?—A. You mean in 1925?

Q. Yes.—A. Well, I don't know. They were young.

Q. All dependent on him for support?—A. They were all dependent on him for support. The first one, I think, was born in 1913, and then about every two years. You would have to figure it that way.

Q. In Miami what, if anything, did Mr. Schroder do or try to do?—A. Mr. Schroder tried to work out his problem by selling real estate. He got there too late to make much success at that. They got a place to live out at Coral Gables in the upstairs of a garage, my sister and her husband and five children, in three small rooms and a bath. My father was down there and my mother in 1925, and they saw their condition.

Q. Were you with your father?—A. Yes; I went with Mr. Spalding to Florida every year. I didn't stay but about ten days or two weeks, sometimes three; but I went there with him every year. We went over there and looked the situation over, at least he

did, and I was with him. They said that situation could not continue to exist. So he told my sister she would have to come on back to Atlanta and she did and brought the children with her, and Mr. Schroder stayed down there for sometime after that.

Q. Was that sometime in the early part of 1925 that he visited them there?—A. Yes; that was in. I should say, February
107 1925. I think that year he was staying there at that big hotel at Coral Gables, not far from where they were.

Q. Mr. Spalding, I want to ask you about your brother Jack's financial condition on or about that time. After he left the Glover people, what did he do then?—A. My brother and I went in the Army. He left the Glover people to go in the Army, and when we got discharged from the Army after the War was over he did not go back to the Glover people. He sold that stock interest in it and went into business in Atlanta, out on the Southern Railway between here and Atlanta, out near Whitehall Street, opened up a business called Atlanta Steel Products Company, and he put in that business all the funds he had except the $18,000 my father had given him around the first part of 1918. He also sold out the interest he had in the Glover Machine Works at Marietta and put that in that business. That business did not prosper; it didn't fail, but it jus' dried up on the vine.

Q. Did he lose the money he put in it?—A. Everything he put in it was lost, although there was no loss to any creditors or anything of that kind.

Q. What did he do then?—A. Then he went to work for a steel concern in Mexico City, and he went down to Mexico City with his wife and he had one child, Bobby Spalding, now in the Navy, who was born about 1914 or 1915, and he went down there with his family and stayed in Mexico City and worked there for a number of years for that steel concern.

108 Q. Do you know whether he made anything during that time to support his family, or whether his father gave him a supplemental allowance?—A. Mr. Spalding did give him a supplemental allowance, sent him a check every month to look after his expenses and help him out. The climate down there, a very high altitude, did not agree with him or his wife. I don't think it affected the child, but it didn't agree with either one of them, and he was anxious to get away and Mr. Spalding told him to come on back to the States, and Jack did leave and come on back. He stopped at Atlanta awhile; in 1925 it was when he came back, and he went on from there to New York, where he went into business and has been there ever since.

Q. Mr. Spalding, in 1925 when these trusts of June 15, 1925 were set up, your sister, Mrs. Schroder's condition, financial con-

dition, was as you described it?—A. Yes; her financial condition was acute.

Q. Her husband was without a job, as I understand it?—A. Her husband was without a job.

Q. Both she and he had lost all their reserves?—A. They had nothing. She had a few little odds and ends. I know she had a few shares of preferred stock in the Atlanta Journal.

Q. Enough to contribute substantially to their support?—A. No; not enough to contribute substantially to their support. Just two or three hundred a year, if that.

Q. And the children were all of the age when they depended on them for support?—A. They were dependent on them for support and education.

109 Q. And your brother Jack's business had failed and he had lost all your father had given him up to that time?—A. That's right.

Q. Was that the condition that existed when these trusts of June 15, 1925 were created?—A. That was the condition that existed, and that was, of course, the reason for the gifts; the motivating influence of it.

Q. Mr. Spalding, I will ask you to turn to the letter that your father wrote to your sister, Suzanne, on June 16, 1925, immediately after the execution of this trust on June 15, 1925, and read that letter in the record, if you will?—A. It is dated June 16, 1925, and is addressed to Mrs. Suzanne Spalding Schroder, St. Simons, Ga.

"My Dear Daughter: On June 15, 1925, I created a trust with the Atlanta Trust Company in favor of you and your children, the same having been executed in three original sets. I enclose you herewith one of these sets to be kept by you. One is kept by the Trust Company, and the other is kept by me.

"This fund is around $50,000.00 and as at present invested bears eight percent, making $4,000.00 per year. The Trust Company's commission of 2½% is $100.00, leaving $3,900.00, which I hope will be net to you. I do not know of any taxes or charges that would come against it, but in order to be on the safe side I have advised the Trust Company that it should send you $300.00 per month on or before the 10th day of each month during the
110 year, and at the end of the year, to pay you over the balance of the net fund remaining on hand in each year.

"This will give you $300.00 a month for living money, and you will see that after your death, it will be administered and paid over to your children until the youngest becomes twenty-one years of age, when it will be equally divided between them.

"If any misfortune should take off the five fine children you now have and you have no others left at your death, it will then

be in your power to provide in advance by making a will disposing of the corpus of this fund to whomsoever you please.

"I have made an identical trust, with the same kind of stock, for Jack, and have also made a trust in favor of your mother, but with different stocks from those you and Jack get. I have not arranged for Hughes yet, but expect to do so.

"It is important that you keep the Atlanta Trust Company always correctly advised as to your post office address.

"Tell Spalding I got his fine letter and am very proud that he writes so plainly. I believe he writes the plainest hand of any of the grandchildren and composes a good letter.

"We are all looking forward to the boys being here, I believe it is Monday morning, the 22nd inst., on their way to camp.

"Nancy is up in arms about Bob getting poisoned with
111 ivy; she now has him in St. Elizabeth's Hospital and is writing that the doctor is giving out alarms about his kidneys. I am in hopes that it will not amount to a great deal and that Bob will be able to join them, if not in the beginning, a little later on.

"We are all pretty well here, keeping in mind your mother's age.

"Hughes and Bolling are over in Athens; will be back tomorrow.

"I hope Billy is getting straightened out at Albany and that he may find something that suits him and that will prove profitable.

"With love to all.

"Affectionately, your father."

Q. Did he write at that time a letter to Jack?—A. Yes.

Q. Would you mind reading that letter?—A. He wrote him at the same time, June 16, 1925.

"Mr. JACK SPALDING, Jr.,

*23 West 82nd St., New York City.*

"MY DEAR SON: On January 15, 1925, I created a trust with the Atlanta Trust Company in favor of you and your children. It was executed in three original sets and I enclose you one of these, to be kept by you. I am keeping one and the Trust Company has the other.

"This stock is worth around $50,000.00, is now drawing
112 eight percent, which provides $4,000.00 a year, less commissions and expenses.

"I have suggested to the Trust Company that it mail you check by the 10th day of each month for $300.00, and that each year in the month of December it pay over to you any balance above this remaining from the net income of this trust fund.

"This will give you $300.00 a month net and a little over, and you will have to live on this.

"You must keep the Trust Company accurately advised as to your correct address in order that the checks will reach you.

"I will discontinue the monthly remittances, since I have created this trust fund to take care of the same.

"You will see that in case of your death the trust continues for the benefit of your children, and that if, unfortunately, you should see that you are not going to leave any children, you will have a right to make a will and dispose of the corpus of the fund as you please.

"I call your attention also to the fact that you cannot anticipate this fund, put any charge on it, or dispose of it in any way, and that any attempt to do so will result in the Trust Company's stopping the sending of incomes to you, and that they will have to be turned over to your child, or children, or their guardian.

"This is done for your protection in order to absolutely insure against these incomes ever being lost.

113 "I am making identically the same trust in favor of Suzanne, with the same sort of stock. I am also making a trust substantially the same, in favor of your mother, but with different stocks. I intend to take care of Hughes for about the same amount, but have not yet done so.

"Nancy has been writing about Bob's condition, both to me and your mother. I am writing her fully on this subject today.

"It has been about forty days since we were in Washington together and when it was agreed you would go and see a doctor and have yourself thoroughly checked up. Your mother tells me she offered to pay for this expense. I cannot understand why it is you have not done this. It looks like a grown man of your age certainly ought to be able in a great city like New York to get an intelligent check-up as to his health in forty days. It is incomprehensive to my mind that you do not attend to this matter. It looks to me like you ought to have your urine, your blood pressure, your eyes, teeth, and anything that might account for your loss in flesh, thoroughly looked into and have it determined if there is anything out of fix.

"I do not know anything else that I can do about it, as I am not a doctor myself.

"We are all pretty well here and certainly hope that Bob will be in shape to come down soon to the camp.

"With much love to all of you, I am,

"Affectionately, your father."

114 Q. I will ask you to look at this letter of January 2, 1925, signed "Billy," addressed to "Dear Mr. Spalding," and state who Billy is, and would you mind reading the contents of that letter?—A. Billy was my sister's husband, W. H. Schröder. This letter was dated at Albany, Georgia, January 2, 1925:

"DEAR MR. SPALDING:

"Your generous assistance to Suzanne has been greatly appreciated. And my constant worry for months can now be a thing of the past, as I have felt even more than she could, the unfortunate attitude that she would be placed in, with her high ideals, and the embarrassment she would constantly feel; when coming in daily contact with her friends, had she not been released from the Atlanta obligations. Young has repeatedly assured her and myself that the Atlanta attitude was unbelievable, and that she positively was released from the Albany indebtedness of the old partnership.

"My mind has been definitely and positively made up for a long while as to cleaning out my own affairs through the courts. And I don't want it handled otherwise, as both of the banks have discussed this feature in person with me and know that I am going to do so. I had, through my correspondence with Mr. R. F. M., tried to convince him that something had to be done before the close of December, as shown by the file I sent. But now that Suzanne is out, it quickens the day for me to personally act.

"Mr. Young is fully informed, as shown by the
115 enclosed letters, and knew that I was going to the courts to clean out, but finally prevailed upon me to wait until he went to New York in connection with his plan to take over the property. The enclosed copy of letter today received by Mr. Pope shows Young has the option to pay cash and take over my unpaid notes. If he prefers to continue the annual payments and conserve his cash, I am going to insist upon having the American eliminated as a creditor. But his plan as originally discussed provided for his buying the property and capitalizing it for sufficient to cover my entire indebtedness to his bank, plus his purchase price, and a provision for me to acquire later on a working interest in the business. But I am content to know that he is protecting himself, and then my cleaning out by law can be accomplished any day. I only regret that I could not get them to act along more definite lines last August, or subsequently, between the two bankers, when one of them verbally withdrew all interest in the property. He says though for me not to worry, and that he is sure of his ground as to any future litigation."

Q. Mr. Spalding, do you know what he referred to when he talked about cleaning out in the courts?—A. He referred to bankruptcy.

Q. And that letter was written how long before these trusts were made—these gifts were made through the trusts?—A. Six months and thirteen days.

Q. Mr. Spalding, in this trust that was made—both trusts
116 that were made June 15, 1925—I find this provision: "Dur-

ing my life, by the unanimous consent of the said trustee, my said daughter and of myself, the terms of this agreement may be amended, changed, enlarged, or limited, but in no event shall the right to revoke any conveyance heretofore or hereafter made to said Trustee, of any property, be permitted." I will ask you whether or not, in 1925 when that trust was made, that it was known to our law firm and the opinion of Mr. Spalding and yourself that that provision did not in any wise keep this trust from being a completed gift within the law?—A. We thought, of course, that it was a completed gift, and that was our opinion and my opinion and Mr. Spalding's opinion.

Q. Did you think a trust made with those powers, with the reservation of those powers, took the property out of Mr. Spalding's estate or left it in?—A. We thought it took it out if it contained the provision that in no event he should ever receive any of it back. We thought that, and it seemed to be the opinion of the Bar generally at that time.

Q. Do you know whether it was the opinion of the Court at that time?—A. As far as I know, I think it was. We looked it up and there was certainly nothing to the contrary.

Q. Were you influenced some by the fact that no change could be made except with the consent of Mrs. Schroder, who had an adverse interest?—A. Why certainly. Nobody would consent to a change to take it away from her after he had given it to her.

Q. Mr. Spalding, did Mrs. Schroder get the full benefits
117 of the trusts during all the time?—A. She certainly did. She got the full benefit of them all the time, and so did my brother.

Q. Mr. Spalding never claimed anything for himself, directly or indirectly, out of them?—A. Why, certainly not.

Q. Were they made for the purpose of meeting this family need that you have described here?—A. It was made for the purpose of relieving this very acute financial stress that my sister and her family were in, and also to help my brother, who was just establishing a new business in New York and was having difficulty in making a living. As a matter of fact, he was not making a living. Mr. Spalding was sending him a check every month for his living expenses. He wanted to put him on his feet where they would not have to be calling on him all the time for help, and expressly said so.

Q. Do you know whether or not the property was returned for its full value to the Federal Government and the gift taxes paid on the basis of the full value?—A. Yes; I know that it was.

Q. Now, Mr. Spalding, these two trusts were enlarged by certain property being added to them on August 26, 1934. Before we go into that, I would like to complete the $10,000.00 transaction with

Mrs. Schroder. I hand you a letter dated May 8, 1930 from Mr. Spalding. Will you state what the substance of that letter is?—A. On May 8, 1930, Mr. Spalding wrote his daughter, Mrs. Schroder, at the home address in Atlanta. It says:

118 "On the 31st day of December 1924, I paid for you to The Atlanta and Lowry National Bank the sum of $10,000.00, as consideration for their releasing you from the notes of The Albany Oil Company, of which you had become a partner, said notes aggregating the sum of $80,000.00. A contract was taken from the bank by your brother Hughes to this effect, agreeing that they would never sue you on these notes, and this has been fully carried out and you have been effectively relieved of the debt.

"This money was put up at your urgent instance and request and you gave me your note for the sum of $10,000.00. This note has been misplaced and I cannot now put by hand upon it. As I am cancelling some obligations of your brother Jack and also relinquishing to your brother Hughes an interest in some property, the title to which he holds and in part for my benefit, I am cancelling and suriendering this debt for $10,000.00 which you owe me and making it a gift to you."

That was May 8, 1930.

Q. I will ask Mr. Smith to state in tthe record what this report from the Revenue Agent shows?

Mr. SMITH. It shows that these gifts returned at $54,000.00—There was 500 shares of Georgia Railway preferred—They were returned by Mr. Spalding at $54,250.00. The Revenue Agent or auditor of the return raised that value to $56,000.00, assessed additional tax, and the additional tax was paid, making a total tax paid of $3,754.78 on those 1925 transfers.

119 Mr. WALKER. That does not have any reference to the $10,000.00 item in 1930?

Mr. SIBLEY. No; there was no gift tax in 1930. This shows the report of the Revenue Agent and it is attached to this request for admission.

Mr. WALKER. We acknowledge the payment of the tax on this and the next item, and we acknowledge the credit.

Q. Mr. Spalding, we are going to come to the gift in 1934 and the reasons for that. What was you financial condition following the panic or financial cataclysm following 1929?—A. I had bought a lot of land in the Miami section.

Q. What did you pay for that?—A. Seventy-four thousand dollars for the eight lots that I bought.

Q. What had you bought in Fulton County in the way of land?—A. I had purchased land in North Fulton County on Roswell Road, for which I had contracted for one hundred and twelve thousand and some odd dollars.

in 1936, 1937, and 1938. He might have been President in 1935, for all I know.

Q. Did he take an active part?—A. Very active. He kept them spurred up and doing something all the time.

Q. Did he give that Association a dinner along about that time?—A. He gave a dinner.

Q. When was that?—A. That was in 1937.

Q. Did he make a speech?—A. He gave them a dinner in October and made a speech out there in July. He purchased something that he thought was rare; it was a bust of Henry W. Grady, and he presented that to the Atlanta Historical Association and made a speech at that time on Mr. Grady, whom he had known quite a while. During 1937 Mayor Hartsfield of Atlanta appointed him on the Centennial Committee of the City of Atlanta, which was celebrating at that time its 100th Anniversary, and he worked actively on that, trying to get certain things done, celebrations, and doing the things that needed to be done.

Q. Have you got copies of the speeches he made on these
135 occasions?—A. Yes, sir; there are the copies of the speeches he made.

Q. What dates were they delivered?—A. The one on Henry Grady was July 31, 1937, and the one he made before the Atlanta Historical Association at the dinner was October 14, 1937.

Q. Is that a copy of the invitation he sent out at that time?—A. Yes.

Q. What date is that?—A. This form that he had made for use in the office was dated just blank October. It must have been the first part of October.

Q. In this period of time, in the '30's and prior thereto, and from the 30's through 1937, when he was in Florida how often did he go to the races?—A. He went every day except Good Friday.

Q. Was he always interested in horses?—A. Very much. He was raised in a horse country and knew all the pedigrees of all the horses. Mr. Northcott, his old friend, used to say when the horses passed the grandstand he always bowed to them, he knew them so well. He was there every day.

Q. When did you first notice a perceptible change in your father's health and activities?—A. In the summer of 1938, after he returned from Florida, he was not at all well. He was weak and just felt low and bad, but I didn't think it was anything serious; that was just my belief.

Q. Mr. Spalding, in 1937 when he made the change renouncing this power, will you state to the Court whether or not that had anything to do with his health or state of mind, and what
136 did prompt that?—A. Absolutely not. Of course, the

Government here is in possession of the facts about that. I have never tried to conceal anything. When the Government agent came around I got out the file and helped to work it out and gave him all these papers.

Q. What had brought to your attention the fact that there had been some change in the interpretation of the law with respect to the effect of this character of trust?—A. Well, we thought we prepared an airtight paper that was good, and a client of mine that had nine children wanted to create some trusts for his children and give them some money. It was his intention to *give* it to them and pass his complete title out. No use concealing who it was. It was Mr. James J. Haverty. I got out this old file of Mr. Spalding's where we had used this trust before, thinking it was air tight and had accomplished the purpose, and I prepared some trusts for him along the same line, the idea being it would go out of his estate, his grandchildren would have it for life, then it would go to their children. The First National Bank of Atlanta was Trustee. These trusts were sent over there; they were accepted and filed. And sometime—I don't remember just when it was—Mr. Perkinson, who was Vice President and Trust Officer, wrote me a letter—I believe it was Mr. Perkinson called my attention to the fact that in this Haverty case what we thought the law was, was not the law. So I proceeded to take the matter up wih my client and get the thing straightened out, and the letters I wrote the client I sent copies of them to Mr. Jack Spalding—put them on his desk, so that he could look over them.

Q. Will you see if that is the letter you sent to your
137 client?—A. Yes; this is the letter dated April 22, 1937.

Q. Is that the one with the notation?—A. That is the one with the notation.

Q. Would you mind reading that?—A. You want the whole letter?

Q. Yes.—A. (Witness reading letter addressed to Mr. J. J. Haverty, Atlanta, Georgia):

"DEAR MR. HAVERTY:

"The Supreme Court of the United States has decided that in order to take a gift out of person's general estate, it is necessary for the donor to completely and entirely surrender all the rights and incidents of ownership.

"You will recall that in the agreements between you and The First National Bank of Atlanta, as Trustee, you reserved the right, during your lifetime and with the consent of the Trustee, to amend, change, and enlarge the terms of the agreements. This provision in the instruments creating the gifts would fail to take these gifts for estate tax purposes out of your general estate. In

other words, should you die the value of the gifts made to your grandchildren will be included for estate tax purposes in your general estate and taxed at the prevailing rates. The amounts which you may have paid as gift taxes would presumably be credited on the taxes assessed against your estate, but this is not certain.

"With these facts in mind, I suggest that I prepare an
138 amendment to each of the six gift indentures, which shall contain substantially the following language:

"'I hereby surrender and cancel all of the right and power retained by me in that certain trust instrument dated the 22nd day of June 1936, to amend, change, or enlarge said trust instrument; and I hereby cancel, surrender and give up all of the right and powers whatsoever I have or may have had, either alone or in conjunction with any other person whatsoever, to alter, amend, revoke, terminate, or otherwise change or modify said trust indenture dated the 22nd day of June 1936, so that from and after this date said trust indenture as hereby modified shall not in any manner whatsoever, or to any extent whatsoever, be subject to any change, alteration, or modification by me alone or in conjunction with any other person whatsoever.'

"Should you approve of this change, which I think important, I would like to add another clause to any such proposed amendment, expressly relieving the Trustee from filing annual or other returns or inventory to any court or official.

"The Trustee might feel that in order to protect itself fully, it should file returns and inventories with the court. As I remember the facts, you did not wish the different trust estates created for the benefit of your grandchildren to be charged with this expense.

"I would like to have your views on these subjects as promptly as convenient, and if you approve of the suggestions made
139 herein, I will proceed at once to prepare the amendment to each of the gift indentures."

Q. Was that done under your advice?—A. Yes; I prepared it. Then I made a copy of this letter directed to "Mr. Jack J. Spalding, Office." I say:

"The contents of this letter will interest you. I prepared the trusts for Mr. Harvey using the ones that you had prepared in connection with Jack and Suzanne. The same provisions are in those trusts, and you may wish to amend them."

That was on April 22nd, and he consulted our partner, Mr. Brock, as I recollect, prepared the release of the power, or whatever you may properly call it.

Q. And when was that executed?—A. That was executed, according to my recollection, on May 1st, and I think in substantially this language.

Q. Mr. Spalding, there are one or two other matters that we will hurry along with. Did your father's family have a record of longevity?—A. They were pretty long-lived people. His mother lived to be 86; his father lived to be 80. On his mother's side they were more long-lived than they were on his father's side, although we had a tradition in the family—it was not a tradition—but it was borne out by the records in Maryland, that a great-great-uncle of Mr. Spalding's, he claimed in his book there, lived to be 120 years old; and some other relative in Kentucky—I didn't make any investigation of it—who lived to be 146 and died leaving minor children. I can't swear to that, of course.

140 Q. What was the approximate value of Mr. Spalding's estate, would you say, in 1925; that is, the property he owned, and in 1934, in 1937, and at the time of his death?—A. I couldn't tell you what it was in 1925.

Q. In 1934 what would you say it was?—A. In 1934 I would say it was approximately a million dollars; or around that.

Q. And in 1937?—A. It was approximately that; perhaps a little more. And when he died it was appraised, I think, around $999,00'.00. He followed out his customs of a lifetime. It is another significant fact—it may have some bearing on this, I don't know—that whatever my father gave to the family, that is, my mother and all of his children, he gave substantially equal amounts to public charities, religion and education, the aggregate of that amount.

Q. We will get to that in a moment. Did he give any—at the time he made this release in 1937, did he make any gifts to any of his children there—make any division of his estate at all?—A. No; he did not.

Q. Did he make any substantial gifts after 1934?—A. No; not except to help build the church on Peachtree Road.

Q. I mean to his family?—A. No.

Q. Will you turn to the list and hurriedly read off the gifts he made for charity, say, beginning in 1919 or 1920?—A. I never attempted to make any list of any gifts of less than $1,000.00. There were hundreds of them of less than $1,000.00.

Q. You just took those that amounted to $1,000.00 or over?—A. That's right.

141 Q. If you will, give those, please.—A. In 1919 he gave to the Marist Society, which operates Marist College in Atlanta, Georgia, $5,000.00. In 1922, to help build the school on Courtland Street in Atlanta—that was a church school, operated

Q. Had you invested or speculated in the market any at or prior to that time?—A. Yes; I was very heavily involved in the stock market when the crash came in 1929 and had lost very heavily. I tried to keep my head above water, kept creeping along the best I could, paying interest and making payments on account out of my earnings in the law business. I had reached the point in 1934 where I couldn't go any further. In other words, I wasn't only broke, but was insolvent.

120 Q. Was that fact known to your father?—A. Yes; he knew about it and took it up and discussed it with me. He wanted to put up a sufficient amount of money to save me from insolvency proceedings, whether voluntary or involuntary. I told Mr. Spalding that I didn't want to see him sacrifice his hard-earned and hard-saved money to keep me from paying for my irresponsible, foolish act, but he discussed it along; said, well, it was a question of opinion as to whether or not I was worth saving, but he was willing to take a chance on it. So he made me gifts of a sufficient amount to pay, or at least get my obligations in shape where I could carry myself, pay out, and in order to do that he purchased this land from me out on Roswell Road.

Q. What amount of gift did he make you straight out?—A. He made me a gift of $50,000.00 in the equivalent of money.

Q. What was that applied on?—A. That was applied solely on obligations that I owed and which had to be paid.

Q. What, in addition to that, did he do to help you financially?—A. In addition to that he purchased this land from me on Roswell Road at an amount of $90,000.00.

Q. It cost you how much?—A. Cost me $112,000.00.

Q. What became of the money?—A. He took that money and saw that it was applied to my debts. As a matter of fact, he applied it there himself, not only what he gave me, but what

121 he paid for the land. He took it and issued his checks, etc.

Q. Was that during the period of the panic, before things had come back?—A. Well, the panic had been on for me since 1929 and was still on in 1934. Incidentally, I want to say that Mr. Spalding did give me an option to purchase this land back for what he had put in it, for $90,000.00, which I never was able to exercise. I took a loss on that in my income tax and the Government disallowed it. They said it was not a bona fide transaction and I paid it and sued for it and Judge Underwood decided it was a bona fide transaction, and I got my money back in that case.

Q. Was that land a part of Mr. Spalding's assets?—A. That land was part of Mr. Spalding's estate at the time of his death, and was included in the estate that was returned.

Q. This Florida property, especially the six lots that you bought for somewhere around $60,000.00—what became of that?—A. I bought six lots and paid $60,000.00 for them. When that hurricane came along—I think it was in 1929 or 1925——

Q. The hurricane was in 1929.—A. I bought the property in 1925. The hurricane came along and blew away all the bulkheads and all the dirt they had pumped in there and the lots went back as part of the bottom of the Pacific Bay and they are there now. I sold those six lots last year for $50,00 apiece. Paid $10,000.00 apiece for them and sold them for $50,00 apiece.

Q. Mr. Spalding, in 1934, did Mrs. Schoder still have five children?—A. Yes, sir.

122 Q. How many of them were in school?—A. I think all of them were in school at that time, except the oldest girl. Well, I can't say positively. The oldest was a girl.

Q. Did all of them go to prep school?—A. All of them went to prep school and all of them went to college, and everyone of them, except the daughter, who is the oldest, received a college degree.

Q. When Mr. Spalding baled you out in 1934, did he write you a letter at that time? Is that a good word, "baled" you out?—A. Rescued me, I suppose would be better.

Q. See if you got that letter?—A. He probably said a great deal more than he wrote. Yes; he wrote me a letter dated August 28, 1934.

Q. Would you mind reading that into the record?—A. (Witness reading).

"I have executed this day to you deed to the property at 2602 Peachtree Road, as part of a gift of $50,000. The deed has been stamped and is being recorded. In this connection, I am enclosing you a letter which applies to the additional land you are using and not embraced in the deed.

"This leaves a balance of $15,830.87 to bring your gift up to $50,000. Under the agreement between you and me, this is to be applied to certain indebtedness of yours, and I am ready to draw checks to you for this purpose whenever you request it.

123 "I am making similar gifts to your brother and sister. All of them are made because of the general depression in business; and especially in your case because of the falling off in incomes from the law practice, the bringing up of your five children, the constant increase in expense of their suport and maintenance, and business misfortunes you have encountered.

"With much love, and hoping you may have prosperity in health and fortune in the future, I am

"Affectionately, your father."

Q. Was it at that time that he added to these trusts $50,000 for all his children?—A. Yes, sir.

Q. Did he write letters to them at that time?—A. Yes.

Q. Would you mind reading them into the record?—A. Here is the letter to his daughter, Mrs. Schroder, dated August 28, 1934:

"In making additional gifts, estimated by me at $50,000 to each of my three children, I am advising that $19,400 of your gift is in the shape of a deed from me to you to the property at No. 160 Rumson Road. The remainder of the gift to you is represented by bonds of the present market value of $30,544.38. This aggregates $49,944.38, which is as near as I can make it, computing the value of bonds and interest.

"I am making this gift because you have five children, one a grown daughter, and the others at ages calling for increas-
124 ing yearly expenditures. While your husband is a splendid fellow and a fine business man, the World War crushed his prospering business and forced him to accept a salaried position.

"These bonds have been deposited with The Citizens & Southern National Bank, Atlanta, as Trustee, and are correctly set forth in the accompanying paper, in which the Trustee acknowledges receipt of them. It is the successor of the Atlanta Trust Company, as Trustee.

"The deed to 160 Rumson Road has been duly executed, stamped and is being recorded. When this is completed, it will come to you.

"I am also enclosing all of the deeds and abstracts touching 160 Rumson Road, which you left with me.

"You should take the original agreement which you have between me and the Altanta Trust Company, creating the trust, dated June 15, 1925, the supplemental agreement, a copy of which is enclosed, dated August 24, 1934, changing the Trustee, and the agreement of August 29, 1934, under which I deposited the above-mentioned bonds with The Citizens & Southern National Bank, and fasten them all securely together, so that you will have your file complete.

"I wish to suggest that, as a part of prudence, you save up the increased income from this gift so as to meet emergencies that may arise in the future.

125 "With much love, and wishing you a happy and prosperous life, I am

"Affectionately, your father."

Q. How much of that represented the home?—A. Nineteen thousand, four hundred dollars.

Q. Did you want to say something else?—A. I just wanted to say this: that these gifts Mr. Spalding made—this one was on his birthday—his 78th birthday, August 29, 1934.

Q. What was Mr. Schroder's financial condition in 1934?—A. Mr. Schroder was a man a great deal older than my sister; a great deal older than I am. He was not resilient with youth. After his misfortunes he had to take whatever he could get. He was working every day, working for the Atlantic Company in Atlanta, at a salary of $25.00 a week.

Q. Later on did he get some Government job?—A. Later on, through the help of Erle Cocke, Charlie Bloch, and Senator Russell and a lot of friends, he was made manager of Domestic Commerce, State of Georgia, under the Department of Commerce.

Q. About when was that, if you recall?—A. John, I could not say, but it was way after this, about 1937, I guess—1936 or 1937; I can't state the accurate date.

Q. Would you mind reading the letter to Mr. Jack Spalding?—A. This letter is dated August 29, 1934, addressed to Mr. Jack Spalding, Jr., in New York City:

"Supplementing the trust created by me in your
126 favor with the Atlanta Trust Company, as Trustee, in 1925, I wish to advise:

"That the Citizens & Southern National Bank, Atlanta, has become the successor of the Atlanta Trust Company in this trust, as shown in the enclosed agreement of August 24, 1934. This also embraces, as you will see, the additions you made to this trust in 1929."

Q. Where did he get the money from for that; do you recall?—A. My brother added some securities to his own trust in 1929, which he inherited from my mother, who died in 1928.

"I am also enclosing you a conveyance, dated August 29, 1934, from me to the new Trustee, The Citizens & Southern National Bank, of an additional gift of the present market value of $50,000, the same being placed under the trust as heretofore created.

"I am making this gift at this time, along with others of like amount to the other two children, because of the general depression and lack of employment over the country, and because Bob is about grown, will finish his college course next year, and you will have to be helping him to get a start in life.

"I believe it is prudent to keep the situation to yourself.

"With much love and best wishes for your future success and prosperity, I am,

"Affectionately, your father."

127 Q. What did he refer to when he said, "I believe it is prudent to keep the situation to yourself"?—A. Well, he thought maybe if some members of his family knew he had more money they would blow it. That's what he meant.

Q. Mr. Spalding, could you give us the ages of Suzanne's children in 1934? Have you got it there?—A. I did make a memo-

randum of it. I can say this with respect to the ages of Mrs. Schroder's children: that her oldest child, Betty, was born in 1913, and then one every two years thereafter.

Q. Did your mother have any independent fortune except what was given to her by your father?—A. No; she did not. My mother and father were both quite poor when they married. Mr. Spalding said he made $600.00 his first year in practicing law in Atlanta.

Q. I want to take up largely Mr. Spalding's activities, say, starting in the late 20's and 30's. How long was he a full member of the firm?—A. Well, he was a full member of the firm, of course, from the time of its organization in 1885, and—I think I made a memorandum of that here—until 1930.

Q. What relation did he have to the firm after 1930?—A. After 1930 he designated himself as counsel for the firm.

Q. Did he stay active and interested in firm affairs during that period of time?—A. Very. He was very much interested in it, took part in all of our deliberations and conferences, and we consulted him, not only in litigated matters, but organizations of corporations and business law generally, matters of policy for clients, etc.

128 Q. Was he at the office every day when he was in Atlanta?—A. He was in the office every day except Sunday when he was in Atlanta, and he was in Atlanta at that time, 1929 and 1930—he was in Atlanta about all the months during the year.

Q. Up until what time, about what year did he come to the office all during the day; that is during the full day? When did he quit coming for the full day and come for the half day, as near as you can recall?—A. I have a note of it here somewhere. I think it was 1935 or 1936.

Q. After that, how often did he come to the office when he was in Atlanta?—A. Well, he came to the office every day, except that he left at one o'clock instead of five o'clock.

Q. Now, I would like for you, Mr. Spalding, if you can, to just give the Court briefly, starting, say in 1930 or 1932, some of the things—and running on through the 30's—some of the things that Mr. Spalding was interested in that illustrated his activities, other than his business and professional activities.—A. Well, in 1932, as has been heretofore stated, he was Committeeman to the National Democratic Convention, and when he got back to Atlanta from that Convention he wrote an article for the Atlanta Journal, giving the highlights on what happened at that Convention. I think that appeared in the issue of July 10th.

Q. How old was he at that time?—A. Well, he was 76 years old—he was 75. He was 76 in August that year.

129 Q. Now, what other outside activities?—A. He gave that dinner to the delegates at the Capitol City Club. That was on June 24, 1932. As I stated, he was interested in schools, and he deeded a piece of property out on Roswell Road, North Fulton County, in November of that year, to Fulton County for the purpose of school purposes, a very nice piece of property, on which the County built a school during the next year. He was a great admirer of Bishop Warren A. Candler, and he, among others, got up quite an elaborate entertainment affair as a testimonial dinner to Bishop Candler, which was given at the Capitol City Club in June 1934.

Q. Did he make a talk at that dinner?—A. He made a talk at that dinner, and they worked out a plan that all creeds should pay tribute to Bishop Candler. Judge Sam Sibley represented the Presbyterians and paid a tribute. Jim Key represented Atlanta. Mr. Alston represented the Episcopalians and paid a tribute. Judge Sam Adams was supposed to make a speech, but he was unable to come, and his statement was read by Dorsey, his son-in-law. Dr. Brittain made a speech, representing the Baptists. Mr. Harold Hirsch made a speech, representing the Jews. Ben Read made a speech, representing the Christian Church. Mr. Jack Spalding made a speech, representing the Catholics. Mr. Thompson made a speech representing the Methodists.

Q. What other activities about that time do you recall?—A. We never had any worthwhile history of Fulton County. Mr. Spalding was interested in the history of the County and
130 also the history of the State, and he collaborated with Mr. Walter G. Cooper—of course, Mr. Cooper did the work—and wrote the history of Fulton County. It was the official history of Fulton County; was adopted by the County Commissioners and the City Council of Atlanta. Mr. Spalding financed that for Mr. Cooper, advanced him the money to get out the publication, which, of course, was returned later.

Q. What date was that?—A. That was in August 1934.

Q. Was he right active in August in helping you in your financial affairs?—A. He certainly was; took a great interest and was very active.

Q. Now, running on to 1935, 1936, and 1937, just give a little running history of the outside things that you might recall?—A. Well, I forgot to say that he always went to the Kentucky Derby, which was the first Saturday in May of each year, in Louisville, and he always went up about a week in advance to get things lined up, as he used to say. He would go in his car, go by Knoxville and go by Lexington, where he had a sister, then go on to Louisville. He did that every year, all these years from 1925 through 1937; he didn't go in 1938.

Q. That is, he didn't go in 1937?—A. He didn't go in 1938, but he did go in 1937, and I usually went with him. In May 1936, you gave a dinner at the Capitol City Club in honor of Mr. Spalding and Mr. Ernest Woodruff?

Q. Did your father make a talk there?—A. He made a talk there and was very interested in the proceeding.

131 Q. Have you got a copy of that program?—A. Yes.

Q. That was when?—A. May 19, 1936.

Q. Do you recall anything else?—A. During 1936 Mr. Spalding made a donation of $5,000.00 to the law library of the Seaboard Air Line Railway at Portsmouth, Virginia, which he represented for many years, in honor of Judge Watts, who used to be General Counsel for the Seaboard. The same year he endowed a hospital bed at Kings Daughters Hospital, Portsmouth, Virginia, in memory of his friend, John Skelton Williams, who was the leading spirit of the Seaboard. Each one of these memorials cost $5,000.00. At least, that was the contribution that he made to those things. And in June 1936, of course as we have already heard, he was a delegate to the Convention, and he gave a dinner in August to the delegates.

Q. What were his outside activities in 1937?—A. Mr. Spalding had written a sketch of his own life and all his ancestors, and he wrote a supplement to that sketch, which was published in 1936. He spent a great deal of time on it in 1935 and 1936. In 1937, of course, he spent the winter of 1937, as customary, in Florida. He got home towards the last of April, where he immediately started to work and wrote the history of the Piedmont Driving Club and the history of Piedmont Park, which he devoted a great deal of time to in the summer of 1937, finishing them that summer. The history of the Piedmont Driving Club was published by the Piedmont Driving Club and sent out to all the members.

132 He went to the Derby in May, and I went up there with him; went in his car and came back, as usual. In August 1937, he went in his car out to St. Paul, Minnesota, to attend a meeting of the National Catholic Charities, the section he was interested in being the St. Vincent de Paul Society. He was out there on his birthday in 1937; that is, his 81st birthday.

Q. I want to stop you right there and ask you this question: During the time he was in Florida, even up to 1937, did he make any special trips or do any special work in organizing those charities, charitable conferences, the societies of those charities?—A. I think I stated that before in my testimony, that he rode all over Florida and Georgia organizing the different conferences.

Q. How late did he do that?—A. He did that up until he got them all finished. I think it was 1935 or 1936.

Q. This was a National Convention of Charities?—A. Yes; this was the National Convention of St. Paul. He went there in his car and came back in his car.

Q. What date was that?—A. That was his birthday. That was in August 1937.

Q. Have you any letters there with reference to his birthday in 1937, giving the attitude of his friends or the impression of his friends with respect to his health, conditions and activities?—A. He received some telegrams from some of his friends.

Q. Would you like to refer to some of them to show the breadth of his contacts and activities during that year?—A. Bob Troutman sent him a telegram.

133 Q. That his law partner?—A. Yes; it says, "Congratulations and best wishes for continued good health and happiness." The employees in the office also sent him a telegram. I don't think it is necessary to read that. Jim Farley wrote him a letter of congratulations. Told him he was pleased to note he was enjoying good health, "and it is my sincere wish you will continue to." He had a letter from Mr. T. C. Northcott, who owned the Luray Caverns in Virginia.

Q. How old was he?—A. He was about ten years older than Mr. Spalding?

Q. What, if anything, did he say with respect to Mr. Spalding's health?—A. They spent their birthdays together, played rummy and talked about everything; they were great friends. He just made this remark: "My dear Judge": He called Mr. Spalding "Judge." "You and I are running a race and fast approaching the Judge's stand. When I look back I can see that you are following close behind me. It pleases me much to notice that your strength and your stride does not noticeably abate." My father lived on the battle ground of Peachtree Creek, and this old man came up there one day and asked Mr. Spalding, who was sitting on the porch one afternoon, if that was not the site of the Battle of Peachtree Creek in that section, and he said yes. "Well," he says, "I was in the Union Army and we charged up this hill to where Captain Evans Howell's Confederate battery was stationed, and the Rebels ran us back," and says, "I hid in a quarry down there and they ran on by me, and I stayed there until
134 night, then I crawled back to the Federal lines." He said, "I just wanted to see that place again." It was on the edge of our place and Mr. Spalding took him down there and showed it to him. That was Old Man Northcott and they were lifelong friends from that time. Just an interesting incident.

Q. Mr. Spalding, what period of time was he President of the Atlanta Historical Society?—A. Well, I know he was President

159 Q. That was the forerunner of the letter written to Mr. Haverty by you?—A. I don't know whether this is the letter or not. I couldn't tell without seeing the original letter.

Mr. SIBLEY. Where is the original?

Mr. WALKER. My understanding is the original letter was turned over to Mr. Pendley and was forwarded to Washington. He made copies for your file and copies for our file. It is in Washington.

Mr. SIBLEY. Voluntarily turned over to them?

Mr. WALKER. That is my understanding.

WITNESS. I don't know whether that is a true copy of the letter or not.

Mr. WALKER. I will show the copies of these letters to Mr. Spalding and possibly later offer them in evidence.

WITNESS. There is a letter from me that I recognize. Let me see what that is. Yes; that verifies my recollection. I told him he could copy the originals and send me back the copies.

Q. Mr. Spalding, I believe that the material thing for our consideration here and now is to see if there was any motive in making the May 1, 1937 release of a power, other than the motive to save estate tax?—A. As I just stated, the motive was to make his intention speak the truth of what his intention was.

Q. Now, yesterday you stated in your direct examination—and I believe I quote you exactly—you were speaking with
160 reference to the Haverty trusts and the letter to Mr. Haverty, "We thought we had prepared an air-tight paper that was good." Now, the only thing about the trust that was not good was that it left the property subject to estate tax; is that right?—A. That was not my idea; that was the paper. What I had in contemplation when I wrote that letter was to have a good paper that conveyed good title out of the donor.

Q. You do not take the position that Helvering v. City Bank Farmers Trust Company affected property rights to a Georgia trust, do you?—A. No, sir; I do not. Whatever the case holds is what position I take with respect to that case.

Q. And it holds that a trust, where there is a reserved power, is taxable, or the property in that trust shall be used as a measure for taxing the corpus of the estate itself; is that right?—A. Well, that is perhaps what it means. That is a matter, I should think, for the Court to decide what that case holds.

Q. Now, I show you a copy of a letter addressed to the Executors, to you and the Trust Company of Georgia as Executors. I believe you have the original of that letter. Do you recall that letter?—A. I can't say that this was the letter, but it seems to me that it is. I can't say positively. If you will assure me that it is a copy of it, I will say yes.

Q. It is a copy that came out of the official files that Mr. Mills Kitchin brought with him?—A. I want to say this: The Trust Company of Georgia and I were Executors of this estate. I was one of the Executors of my father's estate. I did not think it is good practice, and don't yet, for a lawyer to
161 represent himself as a client; so all of these matters were referred to The Trust Company of Georgia, and frequently I didn't even get them. They were sent to the Trust Company, and the Trust Company on any legal matters involving my father's estate took the matter up with Mr. Brock. He was a member of our firm at that time and the legal matters in connection with my father's estate I did not undertake to handle.

Q. The letter referred to is a letter dated June 8, 1942 to Mr. Hughes Spalding and Trust Company of Georgia, Executors, care of Trust Company of Georgia, Atlanta, Georgia, signed by Guy T. Helvering, Commissioner, which is generally referred to as the 90-day notice letter, which is sent out on the assessment of taxes, and in that letter there is this pertinent paragraph: "The value as of the date of both of the trust estates created by decedent on June 15, 1925, for the benefit of Jack J. Spalding, Jr. and Suzanne Spalding Schroder, with a revision of the power to decedent, acting in conjunction with others, to amend, change, enlarge, or limit is included in the gross estate, it being held that decedent in his life time, on or about May 1, 1937, acting, in conjunction with others, relinquished the retained powers as to both trusts to amend, change, enlarge, or limit, and that the said relinquishments were effected by decedent in contemplation of death, as provided by Section 302 (c) and (d) of the Revenue Act of 1926 as amended." Now, it is your understanding that the assessment for taxes was made, not upon the theory that the property was transferred in contemplation of death, but that the
162 power was released in 1937 in contemplation of death?

Mr. SIBLEY. Your Honor, I want to object to that question, unless that question carries this implication: that the Government no longer contends that what was done in 1925 was in contemplation of death; that is, that those acts, as far as Mr. Spalding's health and as far as his properties were concerned, were not in contemplation of death. If he concedes that, his question may have some pertinency, but what he is undertaking to state is to state the Government's contention and then undertake to get Mr. Spalding to sustain by his testimony what we are trying, that is, the basis of this law suit. Do I understand Mr. Walker to now say that as far as his health and conditions in 1925 and 1934——

by the Sisters—gave $21,500.00. In 1924 he gave to the Bishop, towards educating the priests, $2,000.00, and $1,000.00 to Saint Joseph's Infirmary. In 1925, to help build the school on Courtland Street, he gave $10,700.00. In 1926, to the Sacred Heart Church, Atlanta, $1,500.00; St. Anthony's Church, Atlanta, $2,700.00. In 1927, St. Anthony's Church, Atlanta, $6,000.00; Bishop of the Diocese for the education of priests, $1,000.00. In 1928 he gave to St. Anthony's Church, Atlanta, $1,000.00; Knights of Columbus of Atlanta, $2,500.00. In 1929 he created a fund to help educate priests for Georgia; gave to the Bishop for that purpose $50,000.00. In 1930 he gave to the University of Georgia $1,000.00, and St. Anthony's Church $1,200.00. In 1931 he gave, to build this orphanage at Washington, Georgia, which he was afraid would burn up and burn those children, for fire-proofing that, $40,000.00. In 1932, for the same purpose, to complete that job, $10,000.00. In 1936 he gave $25,000.00 to build a school out at New Castle, Georgia, on Peachtree Road; towards the building of that school he gave $25,000.00. In 1937, towards helping to build the church on Peachtree Road, $20,000.00.

Q. What would those charitable gifts add up to?—A. These that are listed run up to about $220,000.00. I have only put here those gifts for which he claimed income tax deductions
142 above $1,000.00. There are many other gifts that he made that were not deductible and they would not show on his income tax returns.

Q. Those two $5,000.00 gifts as memorials to friends, they were not deductible?—A. No.

Q. Do you know whether or not he gave substantial amounts to enterprises or people where it would not be deducted?—A. Yes; a great deal.

Q. Do you think, from your knowledge of his gifts, that you would be safe in saying that he gave an equal amount or more to charity and to outside things than he did to his family?—A. I consider it just about equal, after having checked up; just about equal.

Q. Mr. Spalding, when your father went to Miami in 1937, do you recall the date of that?—A. Yes.

Q. I mean in 1938.—A. Yes, I do; because that was the first time he didn't go down in his automobile. He went everywhere in his automobile. He would drive fifteen or twenty thousand miles a year. He went anywhere from 60 to 75 miles an hour and didn't have a nerve in him. It didn't bother him a bit, I think, because he had never driven a car himself. But he went down by train that year, the first time he had ever done it. He left Atlanta the last part of October—October 21st, according to my memorandum that I have on the subject.

Q. Had it been his custom for many years when he left to get up a list of the things pertaining to his affairs and leave
142 them with you to look after?—A. Ever since I started practicing law in 1910 until the time of my father's death. I was intimately associated with him all the time. Until I married I lived with him and afterwards lived a little while on Fourteenth Street, then lived next door. With him in the business, I just knew everything he did, and I looked after his affairs intimately, and when he went to Florida every year he would make me up a list of things that he wanted me to do, and here is a list of things that he wanted me to do for him while he was gone, covering all these various items.

Q. What are some of them?—A. He wanted Christmas presents sent to certain of his friends. If new great-grand-children were born he wanted presents to them. He wanted the newspaper subscription looked after. He wanted me to have a miniature portrait painted of my mother for the Altanta Historical Association while has was gone. He wanted that done on the theory he left me a description of what mother looked like to him.

Q. Read that, if you don't mind.—A. (Reading):

"I have promised the Atlanta Historical Society to furnish them a miniature of your mother. I would like to get it attended to promptly.

"Have it painted on ivory from the photograph of her oil portrait by Naegele. I am leaving my copy of this photograph on the bottom drawer of the wardrobe, and will not have any with me in Miami.

"I have been talking with Jim Haverty and May about
144 it, and they will give some valuable suggestions about getting the work done and arranging a reasonable price. It ought not to cost more than $200.

"You know your mother was 56 years old when this printing was made by Naegele. Her hair was originally a beautiful brown, but had become considerably sprinkled with gray, as I think the picture shows. She was not at all florid complected, but had plenty of color, and perhaps one of the distinguishing features were her beautiful brown eyes, which were really luminous.

"The artist will perhaps want to know such details.

"You attend to it and see that it is furnished to the Society in a suitable case as promptly as may be."

Then he wanted me to get his Georgia license tag for 1939 just as soon as it could be gotten, and he left a memorandum about what it cost last year, for his Cadillac, and he gave its motor number, model number, etc. That was in October 1938.

Q. That is the last one he made out?—A. That was the last one.

Q. When did Mr. Spalding die?—A. Mr. Spalding died about 2:30, Atlanta time, 3:30 Miami time, December 8, 1938.

Q. Were you with him then?—A. No, sir; I was not.

Q. Will you state when you got there?—A. My friend, Mr. C. E. Holcombe, at the Columbus Hotel, where Mr. Spalding was stopping, called me on the phone and told me, and, of course, I caught the first train, what they called the Sun Beam at that time, and got to Miami the next day about 12 o'clock.

145

Q. Did you investigate his activities that day and the cause of his death?—A. Yes. Of course, it was a matter of considerable importance to me at least, and I talked with Mr. Holcombe, the hotel clerk, and he said Mr. Spalding got up that morning at the usual time and went to church at 8 o'clock, came back and had his breakfast, then he dictated a number of letters to his friends and members of his family, to a public stenographer in the lobby of the Columbus Hotel. Then he got in his car and the chauffeur drove him out to Battle Creek—what they call Battle Creek—a place which was run by old Dr. Kellog at Miami Springs, where he had lunch.

Q. Did he usually have lunch there?—A. Yes; that was his favorite place to eat lunch; they always had things he liked. He ate lunch then drove on back to the hotel and got his mail from the stenographer and went to the hotel desk and got the pen that they used for guests to register with and signed these letters and mailed them himself, stamped them with air mail stamps, and went on up to his room like he usually did to lie down and rest on that afternoon, and he called there about three o'clock, Miami time, called his physician and told him he felt right bad and asked him to come over—Dr. Harris was his name—Then he called Mr. Holcombe, who had an apartment at the hotel. Mr. Holcombe told me that he came down to the room and Mr. Spalding told him he felt bad and thought he might have taken the wrong medicine, may have made a mistake. He said, "I wish you would look at that bottle and see what it says on it," and he said he took the bottle and looked at it and told Mr. Spalding what the thing said, and he said that it was all right, it was not the wrong medicine. He said he was lying on the bed with his head propped upon his hand, and he said he went to put the bottle down on the dresser and heard Mr. Spalding heave a sigh and he went over there and he was dead, and he immediately called me from the room.

146

Q. Did you find out from the doctor and from the death certificate the cause of his death?—A. Well, the doctor said it was coronary thrombosis; a clot in the heart.

Q. Mr. Spalding, maybe you had better identify this letter. Here is a letter from Dr. Harris dated January 21, 1939—that

was a month after Mr. Spalding's death. Would you mind reading that letter in the record?—A. When I got home I wrote a letter to Dr. Harris. He came in just at the time Mr. Spalding passed away. He never got inside the door. I wrote him and thanked him, and he wrote me January 21, 1939:

"I wish to thank you for your very kind letter of recent date concerning your father. I had seen him on a few occasions prior to his sudden fatal attack and felt that there was nothing in his general physical examination which would warrant one in anticipating such an episode as he had.

"I had known Mr. Spalding for many years and always had the very highest regard for him as a friend and patient. I
147 am very sorry that it was impossible to pull him through his last attack.

"With very kind personal regards, I am,"

Q. Mr. Spalding, I will hand you a letter dated December 8, 1938, which is the date of Mr. Spalding's death, addressed to Miss Ruth Blair, executive Secretary, Atlanta Historical Society, and ask you whether or not that is a letter Mr. Spalding wrote on the morning prior to his death that afternoon?—A. Yes.

Q. Will you look at the signature and see if that is his signature?—A. Yes; that is his signature.

Q. Will you state where you got that letter from?—A. From Miss Blair. She is the Executive Secretary of the Atlanta Historical Society. This is one of the letters he signed and mailed about 30 minutes before he died.

Mr. SIBLEY. Your Honor, I want you to look at that signature.

Cross-examination by Mr. CHAS. W. WALKER:

Q. Mr. Spalding, in 1924, December 31st, when your father paid $10,000.00 to get Mrs. Schroder released from the obligation at the bank, he wrote her a letter enclosing a promissory note, which she did execute and return to him, a promissory note for $10,000.00—A. I don't know whether she did or not.

Mr. SIBLEY. He had the note?

WITNESS. He must have had it, because he said in
148 his letter he had misplaced it.

Mr. WALKER. I was thinking about the execution of it.

WITNESS. I really don't know.

Q. In his letter to her of that date he indicated that was being retained as an advancement against her interest in his estate, unless he made a similar advancement to the other children, at which time he would release it. Is that your recollection?—A. Well, the letter speaks for itself. Mr. Spalding let her have $10,000.00, she executed a note for it, and he said something in the letter——

Q. Your understanding is that was not a gift; that was an advancement?—A. Whatever the arrangement was, I don't know. That is a legal conclusion, I assume.

Q. Now, on that date, do you remember whether or not any gift or advancement was made to the other children of his? I believe you said there was not?—A. I believe he wrote a letter on that in 1930, that I read. Said he had done something for Jack and said he had released a piece of property to me.

Q. Now, on June 16, 1925, in his letter to Mrs. Schroder, he states: "We are all pretty well here, keeping in mind your mother's age." How old was she?—A. That was a pleasantry.

Q. How old was your mother?—A. My mother was 18 months younger than he was. That was intended as a pleasantry.

149 Q. The gifts of $5,000.00 at the time of marriage and $15,000.00 for the home of each child and the $18,000.00 in 1918 were none put in trust, were they?—A. No, indeed. I want to make this—it may be a correction and may not. I don't know whether the gifts at marriage—I'm not certain whether they were $2,500.00 or $5,000.00. I think they were $5,000.00, but they might possibly have been $2,500.00.

Q. Now, in the letter that he wrote to you in 1934, you stated that he said more to you personally than he wrote to you. You were constantly with him and working with him as his companion, were you not?—A. Yes; I was his devoted son. What I meant by that, Mr. Walker, was he was like a father would be to a son. He gave me a good lecture and a bailing out.

Q. You knew the purpose for which he was making the gifts and it had all been discussed, and his statement in the letter that it was made because of the falling off of income from law practice and bringing up five children, that really was the information that you had anyway; you knew his motives?—A. I knew how many children I had and I knew what my financial condition was, and I knew how expensive it was to try to educate children and send them to college.

Q. Why would you say that he put that in a letter to you?—A. Calling attention to my duty, and not only that, but the things he wanted me to do and what I had to do, and he made these things possible by bailing me out of this financial difficulty; made

150 it possible for me to do these things that otherwise I couldn't have done. My income was sufficient from my law business to look afer all my duties and obligations only by reason of the fact that he bailed me out of that trouble, and that's what he was calling my attention to in that letter.

Q. Now, in his letter to Mrs. Schroder on August 28, 1934, he stated that the additional gift was being made because she had five children to educate?—A. Yes.

Q. Then he says: "I wish to suggest that as a part of prudence you should save up the increased income to meet emergencies that may arise in the future." She was not under any stringency at that time, was she?—A. Well, she was not flourishing. He bought her a home or a place and he owned it and she was living in it and he was charging her rent for it, and he gave that to her as part of the gift. She was not in any flourishing condition, and he meant by that as the children got older and had to go to college and complete their education it would be more expensive. I assume that is the emergency he had in mind.

Q. Did Mr. Spalding have the practice of contributing to the education of each of his grandchildren? I observe that in his will those he had uneducated at the time of his death, he set up a fund for each one?—A. That's right.

Q. And he had contributed the educational expenses for each one who was educated prior to his death, had he not?—A. Not entirely. He had helped because some of the schools were quite expensive.

Q. He set up, I believe, $10,000.00 for each grandchild who was thereafter to be educated after his death?—A. Well, there
151 was only one of them that had not at the time of his death. That was my little boy that he set up a $10,000.00 trust for. He is now 13.

Q. At the time these trusts were set up in 1925, Mr. Spalding had the primary purpose, I believe you testified, of assisting his children and equalizing the shares. Did he have a secondary purpose to avoid estate tax?—A. Absolutely not. Mr. Spalding was one of the few men that I ever knew that thought the Government was right about breaking up great big estates with estate tax, and he has said so frequently, on many occasions, that it ought not to be; and that the folks who had made their money under the protection of the law and saved it, the Government ought to take it and help children who did not have anything.

Q. By changing the title to the property and vesting it in a trust fund under a Trustee, it resulted in a savings of estate tax and economically enured to the benefit of the children, thus accomplishing his full purpose, didn't it?—A. Well, I don't know what you are driving at. Let me tell you what the meaning of all this is, if you are really interested in knowing it. Mr. Spalding thought that every person ought to stand on their own bottom, that they ought to be tried out, and that you ought to experiment with them and give money to them to see what they would do with it, and he experimented with us. He started giving us money as soon as we got married, or to get married on. Then he kept giving money with no entailment to see if his children could handle money, to see if his children could look after themselves and

their children. He found out from experience what
152 I, with some embarrassment, recounted to you generally, that that could not be done. Therefore, in order to protect his own children against want or something that he could not protect them against, or they would not protect themselves against, he put this money in a trust, he thought a completed gift, in order that his children might enjoy it and reap the benefit of it and live on the income, or help them live on the income while they lived, and when his own children died it would go to their children, his grandchildren, and give them a start in life. Mr. Spalding never had any more idea of tying any string onto this so that he could ever transfer it in any way. He was not that kind of a man.

Q. Now, the children did enjoy the economic benefits of this trust fund, did they not?—A. You mean my brother and sister?

Q. Yes, sir.—A. I don't know what you mean by economic benefit. They are still getting the income.

Q. Well, they enjoyed the income?—A. Well, if that is what you mean by economic benefit. They got it and are still getting it. They will continue to get it, I guess, unless the Government gets it.

Q. Mr. Spalding had an estate of about $1,000,000.00 when he died?—A. That is what the estate tax return shows.

Q. And he had an estate on May 1, 1937, of approximately that amount?—A. Why, certainly. You mean a year and a few months before he died?

Q. Yes.—A. Yes.

Q. What was his motive in releasing the reserved
153 power in these two trust instruments?—A. Well, he thought this: He thought he had given his property away and he thought that was the law. He wanted the children to have the benefit of it; he did not want it to be a part of his estate under any situation, and he wanted his children to have it and wanted them to enjoy it. He never had an idea of taxes; their taxes didn't mean anything to him.

Q. Then the children did have the property and enjoy it, didn't they, under the gift? They were enjoying the property and the income from it, and that was in accordance with his original intention?—A. His original intention was that they would have the property, but they were not to have the custody of the property; they were to have the income from the property, and when they died his grandchildren got it. If they didn't leave any children, they could will it.

Q. How could the release which he executed in May 1937 affect their receiving the income from the property?—A. I never said that it did.

Q. He knew they would continue to receive the income?—A. How do I know what Mr. Spalding knew? What are you trying to do—draw a legal conclusion by an admission from me? You are asking me something that is beyond by knowledge.

Q. In your letter to Mr. Haverty you said, "In other words, should you die, the value of the gifts made to your grandchildren will be included for estate tax purposes in your general estate and taxed at the prevailing rates."—A. That is the way I figured it out from the decision.

154 Q. Then in your memorandum to your father you say: "The contents of this letter will interest you. I have prepared the trusts for Mr. Haverty, using the ones that you had prepared in connection with Jack and Suzanne. The same provisions are in those trusts, and you may wish to amend them." You were talking about estate taxes then, were you not?—A. I was thinking about some decision that was upheld that might go to defeat Mr. Spalding's intention.

Q. Intention with reference to what?—A. Intention with respect to making a gift where his children and grandchildren would get it apart from his estate.

(Reporter's note. At this point the Court adjourned until the following day.)

Q. Mr. Spalding, Mr. Pope Brock was formerly a member of your firm, wasn't he?—A. Yes, sir.

Q. In the beginning of this case did he handle the case some with the revenue agents?—A. That is my recollection.

Q. Did he prepare a memorandum brief and submit to the Revenue Agent in charge when the case was under discussion?—A. I am not sure, but I think he did prepare a memorandum brief. Whether he submitted it to the Revenue Agent in charge I don't know.

Q. Would your file have a copy of the memorandum brief that was submitted to the Revenue Agent in charge?

Mr. SMITH. I am sure it would.

155 WITNESS. I'm not sure, but the perforations in that paper and the kind of paper would indicate that this paper came out of our file.

Mr. WALKER. We do state that this is the memorandum brief that was filed.

Q. The positions taken by Mr. Pope Brock would correctly represent the position of the executors in this case, would they?

Mr. SIBLEY. Your Honor, I object to that question, because I don't know what they are. I will stand on any position that Mr. Brock took on any case I have ever seen him in, but I don't believe it is proper to try to influence the Court or to defeat a case on the basis of arguments that may have been made before some

other tribunal. As I say, I always stand on Mr. Brock's arguments, because they are generally sound, but if we go into that sort of thing I think we are going into an element way beyond the issues in this case.

The COURT. Yes; so far as actually representing or illustrating any intention on the part of Mr. Spalding himself. Now, so far as what the witness had in mind in making his memorandum, you could, I think, well enough ask him if this brief represents what he had in mind, not necessarily what his father had in mind.

Mr. WALKER. I think, your Honor, for the purpose of impeachment—if there was any statement to the contrary.

The COURT. No; I don't mean impeachment. I am not clarifying what the memorandum meant.

156 Mr. SIBLEY. The difficulty we get into is this: That the Courts, in the presentation of arguments by counsel are more liberal than anything else, because he presents it as he sees it. I am not objecting to it on the basis it is either prejudicial or not prejudicial, but we get into a realm that takes our case away from the issue.

The COURT. I think so, insofar as it might have some relation to the testimony of this witness.

Mr. SIBLEY. Of course, I would not object if he brings it to that.

WITNESS. So far as this particular paper is concerned, I have no recollection of ever having seen it.

Q. Well, at the time your father made the transfers, did he have a double motive, one motive being to avoid estate taxes?—A. When Mr. Spalding made the gifts of 1925—That is what you refer to, I assume?

Q. Yes; and the gifts of 1934?—A. And the gifts of 1934. His motive was to provide for his children and his grandchildren, as I said yesterday. He had no motive of defeating any taxes.

Q. Then the release made in 1937 was because of an entirely new motive, originating in 1937?—A. The motive, as I understand it, that actuated him in making this paper of May 1, 1937 was, may I say, analogous to a nunc pro tunc order of Court—to make the trusts or the instruments of 1925 and 1934 speak his intentions, and that was his motive.

Q. Then in 1925 and 1934 he had the intention, in addition
157 to benefiting his children, for whom the trusts were set up—he had the intention to do it in a way that would take the property out of his estate for estate tax purposes; is that right?—A. I don't think he ever had estate tax in mind at all. As I told you yesterday, Mr. Spalding never made any effort, or never had any idea of avoiding any taxes which he may have lawfully owed to the Federal Government or anybody else. He was so

meticulous about taxes that he would not own any security that was taxable in Georgia, ad valorem. It was the custom at the time for the tax authorities not to tax notes and accounts and things of that kind. It was a matter of conscience with him. He wouldn't even own any of those kinds of properties, because he said he wanted the Government authorities to know every cent of taxes that he might, in his conscience, owe any Governmental authority.

Q. Well, if he had made the transfer without reserving that power, it would not have been taxable, would it?—A. Well, I should say that is a conclusion.

Q. Well, as an attorney who advised him at the time he made the release?—A. I did not advise him. I furnished him the facts.

Q. Do you mean that you and Mr. Spalding never discussed the Haverty letter?—A. No, sir. The Haverty letter—I simply sent it in on Mr. Spalding's desk, and he thereupon took it up with Mr. Brock. That is my recollection.

Q. You gave a copy of this letter to Mr. Pendley, did you not?—A. Yes, sir; I gave him all my file, evidently a mistake.

158 Q. You mean it was a mistake to give it to him?—A. Well, I think it is a mistake, when they misuse papers.

Q. Now, in response to your postscript, which told your father that he would be interested in the contents of this letter, you and your father did not discuss the situation at all?—A. I have no recollection of it. My recollection of it is that he immediately took it up with Mr. Brock. I never posed as a tax expert and I don't now pose as a tax expert. I followed the more practical side of the law business, and when it came to these highly technical matters I thought a man in that field should be the one to handle it, not me. I turned my file over to them to go through. That has always been my practice, to say, "I have nothing in the world to conceal; here is my file." That has always been my custom up to now. As a matter of fact, in connection with our office file, I gladly turned it over to the Agent. I don't think it was Mr. Pendley. It was another agent, and he asked me if he could have the papers to take them out, and I says, "certainly" and he took them out, and then asked, says, "Do you mind if I copy them?" I says: "No; I don't mind if you copy them, provided you send me copies," and my recollection is they did send me copies; complete and full copies.

Q. I show you a copy of a letter from Mr. W. T. Perkerson addressed to you, June 29, 1936.—A. As far as I know, this is a copy of a letter directed to me having to do with an entirely different thing, with a client; has no reference to this.

Q. Relating to the Haverty estate?—A. Yes, sir.

Mr. WALKER. The position we are taking is that the tax was assessed on the basis of the release, and not the transfer, according to this paragraph.

Mr. SMITH. Your Honor, please, it seems to me the Government's letter certainly sets out its contention better than Mr. Spalding's testimony. He is trying to ask Mr. Spalding to read the Government's mind in their own letter.

Mr. WALKER. After having read the letter, I withdraw the question.

Mr. SIBLEY. I had another idea that I wanted to get clear. We are trying this case on definite issues and trying it on indefinite contentions. I was trying to get the Government to say, in view of that question, as to whether or not you are now willing to
163 concede that in 1925 and 1934 Mr. Spalding's condition was such, insofar as his health was concerned, that no attack could be made; that whatever he did then and whatever the legal effect was then, it was not done in contemplation of death?

Mr. WALKER. I think I might correctly state the position, and would like my brother to correct me if I do not state it right. The Government's position is that the relinquishment of the transfer—relinquishment of the reserved power on May 1, 1937 is the act which made these trusts taxable. Now, our position might be analogous to a demurrer in a State Court. We feel that is not necessary for us to go into the motives and intentions in 1925 and 1934, and we are not affirmatively going into those motives, but when the plaintiff goes into those motives we are not willing to concede the plaintiff's case. However, we stand on our original position and whatever may be shown with references to motives or activities or health by us would be purely defensive and would not really be our case.

Mr. SIBLEY. As far as we are concerned, or as far as the Court is concerned, that may be very material, but I was trying to see whether or not you are conceding——

Mr. WALKER. No.

Mr. SIBLEY. You are not conceding anything?

Mr. WALKER. No.

Q. The question I asked before the reading of this paragraph was, you did understand that, didn't you?

164 Mr. SIBLEY. I object to that. It is immaterial. They have set it out in their pleadings.

Mr. WALKER. If we cannot get you to agree that you received the letter then——

Mr. SIBLEY. We need not waste any time on that. If you say Spalding?

WITNESS. Why, certainly we received the letter. Whether that is the letter or not I don't know.

Mr. SIBLEY. We need not waste any time on that. If you say that is the letter, put it in.

Mr. WALKER. We say that it is a copy of the letter and put it in evidence, dated June 8, 1942. I do not put in the whole letter, but put in the paragraph which has been read into the record, identifying it as it has been identified.

Mr. SMITH. Do you mean you are offering it now?

Mr. WALKER. No; the paragraph that I read in, we are offering that as evidence as being in the original letter which was forwarded.

The COURT. I don't quite get the materiality anyhow of going into that question. The Government certainly contends now in this case just what you state; apparently that is all the letter states.

Mr. WALKER. Just wanted to get it in the record clearly.

Q. Mr. Spalding, we have had some testimony to the effect that your father, Mr. Jack J. Spalding, was in good health and was not a sick man. Was he free from the infirmities of on-
165 reaching years or did he have the infirmities that would normally be expected in an elderly man?—A. I would say that, considering his age he had less infirmities than any man I ever know. He was very careful about his health, and subscribed to the Chinese theory that to pay a doctor to keep you well was money well spent. He practiced that ever since I can remember.

Q. Did he have any serious illness in the last fifteen or twenty years of his life?—A. No, sir.

Q. Do remember on June 25, 1934, when he went to St. Joseph's Infirmary in a wheel chair for a stay there and an examination?—A. I remember that he did go to St. Joseph's Infirmary for a check-up. I think he stayed two days.

Q. And do you recall that he went in a wheel chair?—A. Well; I didn't go with him, but I know this: that it was the custom of hospitals when anybody came to the hospital, as a rule, to meet them at the receiving section and take them in a wheel chair to their room.

Q. Do you know whether or not, on June 28, 1934, he left the hospital, that is three days later—and he left in a wheel chair?—A. No, sir; I didn't go with him, nor go for him. If I had thought that he was seriously ill, or even moderately ill, I would have been with him if I had been in town. I don't know whether I was in town or not, but I think I was.

Q. Mr. Spalding was of that staunch, strong character which kept him from giving up readily to small infirmities, wasn't
166 he?—A. I think Mr. Spalding, kind of—He was very staunch in his character and he did not believe in giving

up to anything or anybody, as far as that is concerned, but he kind of nursed himself, as far as health was concerned.

Q. He was very conscious of health and ailments?—A. He was conscious only of keeping well all the time. He was, as I saw it, more concerned about keeping well than he was in keeping from being ill, than he had any concept of being ill.

Q. From the hospital record, which by agreement we introduced, I will ask Mr. Sibley to correct the statement that I read, if it is incorrect, record from the St. Joseph's Infirmary between June 25, 1934 and June 28, 1934.

Mr. SIBLEY. Read the quotation.

Mr. WALKER. I can read the diagnosis, can't I?

Mr. SIBLEY. Yes. We agree, Your Honor, that as far as any part of the record is concerned, its materiality is a question for the Court, but we have agreed it is not necessary to bring a certified copy or somebody here to identify the record in that case, but I want to call your attention to this fact: I am not objecting to it on the state of it; some of these things will necessarily come in after we close our case, but I am objecting to that part that is itself affirmative evidence on your part.

Mr. WALKER. On that occasion he was diagnosed as having a chronic myocardial disease and chronic nephritis. The hospital showed the following entries: "Pulse strong and very irregular;
167 patient says pain is still suffered in cardiac region; complains of shooting pains in head and eyes. Patient complains of tired, worn-out feeling. Patient states he feels very week and tired."

Q. Did you know, Mr. Spalding, that your father had symptoms of a diagnosis of myocardia disease?—A. No, sir; I didn't know that, and I don't know what it is.

Q. I guess that is a matter of medical testimony. My understanding is it is an inflammation of the heart muscles.—A. I don't know that he was aware of it. I was not aware of it. He didn't act like it.

Q. Did you know that he had been diagnosed as having chronic nephritis, which I believe is the medical term for chronic Bright's disease?—A. No, sir; I didn't know that.

Q. In his interest in his health and prevention of disease, it was his custom to seek medical advice often, was it not?—A. I don't know what your first phrase there was. I didn't get it.

Q. In his interest and welfare as to health, he sought medical advice frequently, didn't he?—A. Yes, sir; very frequently. I have been with him to different places.

Q. Did he go to Battle Creek Institution in Michigan in 1931?—A. I don't remember the year, but he did go up there, but not, of

course, for medical treatment, as far as I know. He went there to rest. That was a kind of hotel.

168 Q. Was he the type character who would go to the hospital for a check-up, get a diagnosis, and then not ask or inquire of the doctors as to the nature of his illness or the remedies of it?—A. Well, I think that as far as Mr. Spalding is concerned, he let the doctor look after that. Dr. Hines is here, his physician for twenty odd years, and he can tell you more about that than I can. I don't know.

Q. Would he make inquiry of what the doctors' examination showed?—A. From whom?

Q. From the doctor?—A. Not that I know of.

Q. Then you mean that he would go for a check-up and would leave without seeking the information?—A. I don't mean anything, because I don't know. I went with him once to Johns Hopkins.

Q. When was that?—A. I don't remember. I think it was in 1929 or 1930.

Q. What was the nature of his ailment at that time?—A. Well, Mr. Spalding had an idea about that time that he might have a cancer.

Q. Of the colon or intestine?—A. No; of the kidney section. And I went up there with him and he went to Dr. Hugh Young and he made the examination, which was quite painful. I was there with him, and he told Mr. Spalding there was nothing the matter with him, and he came on back home. I thought that at the time a lot of men kind of get notions as they get up in years—woman and men and everybody else—that they have something wrong with them, and for protection they go and check up. He went up there to see if he did have anything of that kind. Just

169 one of those futile things he did. There was nothing wrong with him, and he amused me very much; seemed to be quite disappointed that he didn't have it. He made up his mind that he might have it and he seemed to be disappointed that he didn't have it.

Q. Now, in 1937, sometime during the winter, do you recall that he had a case of flu, accompanied by a heart attack, and that was the occasion when the family was considerably concerned about him? He was in Florida, I believe, at the time?—A. No, sir; I don't remember. What family?

Q. You and others close to Mr. Spalding.—A. I have no recollection.

Q. Do you know that he attended the Battle Creek Institution in Miami rather regularly for a period of about three or four years?—A. Oh, yes; that was the meeting place for the old men.

They went out there and had the best time. There wasn't much doctor business about it. They had a solarium out there in the back, and they would go out there with these curtains up and all lay out there naked in the sun and talk and gossip all day. That was the main part of that, and eating lunch out there, which he enjoyed very much, because he liked that kind of food that old Dr. Kellog prescribed—raw onions and raw carrots and all that kind of stuff, what we used to call hay; he just liked it.

Q. Do you recall that he had considerable complaint as to his digestive reactions, diagnosed as spastic colitis by the Kellog doctors?—A. I don't know. You have the edge on me there. You probably have the records and I don't. I don't know what they show or anything about it.

170 Mr. WALKER. Now, if I present the man who has seen and copied the original record in 1938, will that be agreeable?

Mr. SIBLEY. Subject to our check.

Mr. WALKER. I would like to have an agrement, if it is satisfactory, that we tender this quotation from the hospital in 1938, and we represent in our place that it is true; then give me a chance if it is true; then give me a chance if it is not correct and it will be withdrawn. That is July 27, 1938.

Mr. SIBLEY. I think that is all right, but I don't want to be agreeing to the position as to the weight of it as proof of illness.

Mr. WALKER. Now, the diagnosis at that time was: "Chronic myocarditis and spastic colitis." This is taken from his personal history, and I quote: "Patient has been having periodic check-up on physical condition for several years, and he comes to the hospital today mainly for another physical examination. Has been taking various treatments, e. g. Battle Creek treatments, etc. for several years. Had flu, along with heart attack, last winter, and since that time had fluttering of heart, associated with moderately severe indigestion."

Q. Mr. Spalding, are you acquainted with those conditions represented in that report?—A. I, of course, don't know, can't say specifically. I wanted to spare the young lady of saying that his Battle Creek treatments consisted mainly of enemas. He was a great believer in enemas.

Q. That was for a colon condition?—A. Now, you
171 will have to testify as to that yourself. I don't know. He was a great believer in enemas, and that is what I think he means by the Battle Creek treatments. Now, as to having any heart attack last winter, which was 1937, it seems to me I would have known of it. I never heard of it before, and I don't think it's true.

Mr. SIBLEY. That is not given as a statement from Mr. Spalding; that is given as a record that may have been made by a nurse?

Mr. WALKER. It is given as his personal history.

Mr. SIBLEY. Not as a statement from him?

Mr. WALKER. I could not correctly say that it was based upon his statement. I would have to say that it was the personal history record at St. Joseph's Infirmary.

WITNESS. If he had had a heart attack in the winter of 1937 when he was in Florida, I certainly would have been advised immediately, but I was not advised, although I visited him for a week or ten days in the winter of 1937.

Q. Do you remember what months your visit was in?—A. I could not say what month that was. I usually took his income tax return down as an excuse for making the trip, and usually went about Washington's birthday, which was supposed to be big doings in Miami—usually between Washington's birthday and the 15th of March.

Q. When you say that for a man of his age you considered him in better health than the average man, you are keeping in
172 mind the fact that many men die before they reach seventy-five, are you not?—A. Well, I could not tell you just exactly what I have in mind. I have in mind that Mr. Spalding seemed to me like the "babbling brook" that I thought would run on forever, on account of the care he took of himself and of the check-ups that he had in order to keep from having any trouble. Even his thoughts and ideas related to life and the things of life and not to death, although he tried to so live, and so stated that he would be ready for death at any time.

Q. Do you know what caused him to think that he had cancer of the kidney?—A. No; he just took a notion just like people do. Any married man who gets to be 55 or 60 years old, he knows his wife has had cancer five or six times.

Q. Does that indicate that he was somwhat cancer conscious?—A. I think he had some friend maybe that died with cancer, maybe about that time.

Q. Was that an isolated instance?—A. That is the only attack of cancer he ever had.

Q. Did he ever have any other attacks of any other disease that way that you recall?—A. No, sir. I don't know what he had in his mind. He was always getting the doctor to go over him. I think Dr. Hines for years went out to see him every week, took his blood pressure, looked at his tongue and gave him bile tablets and something of that kind. He believed in value received. If he was paying the doctor he wanted some medicine; pills or something.

Q. Did he ever have a serious case of blood poisoning, that you recall?—A. Yes, sir.

173 Q. You remember when that was?—A. I don't remember. You seem to have the record. If you could refresh my recollection——

Q. Did that leave him all right?—A. Will you indicate to me when it was?

Q. In about 1920.—A. I don't know just what year it was. It may have been in 1920; I thought it was a little earlier than that. Here is what happened: He had a severe case of hemorrhoids. He did not like operations, and he took treatments to get rid of this condition without an operation and got an infection and he had blood poisoning from that infection. He was very ill and I thought he was going to die. If it was in 1920 I don't remember. I can't remember that far back. He was in the hospital at St. Joseph's Infirmary. He had an infection from that blood poisoning and that settled in his hip and the result was a shortening of his leg. Which one it was I don't know, but he got perfectly well from that, much to the astonishment of my mother and the rest of us, because we were afraid it would result in his death.

Q. He was 64 then, wasn't he, in 1920?—A. Well, he was born in 1856, whatever that made him.

Q. Do you remember how long it took him to recover fully from this blood poisoning?—A. No, I don't; but it was some time, and when he left the hospital in Atlanta, St. Joseph's Infirmary, he went to Atlantic City to recuperate, and I went with him and Dr. Hines here also went with him.

174 Q. Was he ever as strong and robust after that illness as before?—A. His health, in my opinion, was just as good after that illness. Perhaps he was more inclined to take better care of himself, and I think his general health was better.

Q. Do you think he made a complete recovery within 12 months?—A. I don't know. I don't know what you mean by a complete recovery.

Q. I show you a gift tax return that is dated November 15, 1927, with an affidavit attached, which appears to have been executed by Mr. Jack J. Spalding and witnessed in the presence of Estes Doremus. Is that Mr. Spalding's signature?—A. Yes, sir; and that is Mr. Doremus' signature.

Mr. WALKER. We will offer this gift tax return, or really the affidavit is what we want to offer in evidence, to save some record.

Mr. SIBLEY. What is the purpose of it?

Mr. WALKER. Showing the condition of his health in 1927. I would like to read it:

"Before me personally appeared the undersigned, Jack J. Spalding, who being first duly sworn, deposes and says on oath as follows:

"I am 71 years of age and reside at Deerland, Peachtree Road, Atlanta, Georgia. My profession is that of lawyer and I have been engaged in the practice of that profession in Atlanta, Georgia since January 4th, 1885. I am the senior member of the firm
175 of Spalding, MacDougald & Sibley, whose address is Atlanta Trust Company Building, Atlanta, Georgia.

"In 1920, I was infected and suffered a severe case of blood poison through my entire system, which left me with a very bad leg and foot. I have been compelled, on account of this, to keep out of cold weather and as a consequence have spent the winters since then in Florida, and I am now preparing to leave for Florida as soon as the first cold weather strikes Atlanta.

"As a consequence of this condition, my personal business affairs have been largely attended to by my son and law partner, Hughes Spalding, who holds a power of attorney to sign my name to checks on my private account at the Atlanta & Lowry National Bank. My habit has been, since going to Florida, for the winter, to get all of the data available for my income-tax return and have him prepare the return after the first of January, when it became definitely known what the items would be. After preparing the returns, he would either bring or send these returns down to me, or if occasion called me to Atlanta temporarily, I would execute them as prepared by him.

"About June in the year 1925, I made a number of gifts to my wife, Elizabeth H. Spalding, my son Hughes Spalding, my son Jack J. Spalding, Jr., and my daughter Suzanne Schroder,
176 and during that year I made a number of charitable gifts. These charitable gifts appear on my income-tax return filed in 1926, but the gifts to my wife and children do not appear and no return of these was made.

"The reason no return was made was because I was in Florida the winter of 1925–26, and the return for income tax was prepared by my son Hughes, in Atlanta, Ga., and brought to Miami during the first part of March 1926, being between the 9th day of March and the 14th day of March 1926. My said son brought this return back to Atlanta with him and filed it for me and drew a check for the payment of the first installment of the income tax.

"At that time newspaper notice was in the press to the effect that the gift-tax law had been repealed by the Revenue Act of 1926, which I have learned since was adopted on February 26th, 1926. This notice of repeal left me with the belief that it applied to gifts made in the year 1925, and accordingly, no return was made of the gifts, as I bona fide thought and believed that the law had been repealed.

"It was quite considerable time after this, when discussing the matter with one of my partners, the doubt was suggested as to the

repeal as to gifts made in 1925, and an investigation developed that it did not embrace and cover such gifts. At the time
177 my income tax return for 1925, filed in 1926, was made, the gifts tax return was not made, solely because I thought it had been repealed.

"I have never practiced or specialized in income, estate, or other Federal taxes and whenever any matter of that kind has come to me for consideration I have always employed an expert to handle it. At the time that this return was due in 1926, no partner then a member of my firm, had ever specialized in such matters and the most connection we had ever had was in some litigated case where we had been retained as counsel and where some expert had handled the matter.

"It is my desire to file a gift-tax return at this time, and to pay all interest that may have accrued on the tax since the tax were due. This affidavit is made in order that it may be exhibited to the Commissioner of Internal Revenue, at Washington, D. C., in support of my request that the penalty for failure to file the return promptly, be waived. It has never been, and is not now, my intention to avoid the payment of one cent of taxes that I may lawfully owe the United States Government."

Signed "Jack J. Spalding" and dated November 15th, 1927. We offer it only for the purpose of indicating the condition of his health between 1920 and November 15th, 1927.

Mr. SIBLEY. Mr. Spalding, do you remember how long the gift tax was in effect in the original law?

178 Mr. SPALDING. I don't recall. It was a short while originally, then it was repealed.

Mr. SIBLEY. Mr. Walker, was it just during the years 1924 and 1925?

Mr. KITCHIN. The gift-tax provision in the law was put in in the 1924 Act, and that law taxed gifts made prior to the enactment of the law, and was held unconstitutional in Undermyer v. Anderson, in the 275 U. S.

Mr. SIBLEY. Can we agree on this: That that law was applicable only in 1924 and 1925, and that thereafter, until 1932, it was repealed?

Mr. KITCHIN. That's right.

Redirect examination by Mr. JOHN A. SIBLEY:

Q. Mr. Spalding, there are just one or two questions I would like to ask you. In the set-up down at Battle Creek—is that what they call it in Florida?—A. Call it Miami Battle Creek. It is at Miami Springs, and it was a village and a hotel. It was built by the airplane man, Glen Curtic, and it was a failure, as far

as a subdivision was concerned, and he gave it or sold it very cheaply to old Dr. Kellog, the hay man.

Q. It that on the way to the races, geographically, from Miami?—A. Yes, sir; that is one of the ways and one of the best ways to get to the races from down town hotels in lower Miami.

Q. Did your father stay at the hotel when he was in Miami?—A. Yes; he started staying at the Hotel Ernie and they
179 stayed at the Roney Plaza, and when my mother died he wouldn't stay at the Roney Plaza any more; stayed at the Columbus Hotel.

Q. After your mother's death, did he make it a practice every day, in going to the races, to stop at Dr. Kellog's and get dinner and then go from there to the races?—A. Not every day, but very frequently.

Q. Was that his custom?—A. I would say that was his custom. He would leave the hotel around 11 o'clock, then go by there and get lunch, then go from there to the races. He would always like to get to the races 30 minutes or more before they started.

Q. Did a great many interesting people go to Dr. Kellog's place from all over the country for a check-up and some for association?—A. Yes; I think there were a great many interesting people there; always some Federal Judges. He met a good many there from up East and Middle West, interesting men that were in business, that just came down there to rest and relax. They ran a hotel there and they stayed there, but my father wouldn't stay there, and very few men of normal type would stay there, because they didn't allow anybody to smoke on the premises or eat meat.

Q. Did your father follow the Kellog diet for a number of years? Did he take that up?—A. Yes; he took that up and took all these different preparations that Dr. Kellog prescribed. He would go to the races in Louisville and we would drive in the car and spend the first night at Knoxville and he would have all these cans and set them out on the table at the hotel, much to the amusement of the waiters.

180 Q. Was one of Dr. Kellog's fads that you should not eat meat?—A. Oh, yes; I think his fad was you should not eat meat publicly.

Q. How old was the old doctor at that time?—A. Doctor was a good deal older than father. He died, I think, two or three years ago, at about 97 years of age.

Q. Was another theory of Dr. Kellog's to keep your system open by irrigation?—A. Yes; that seemed to be the main treatment. He blamed practically all illness on constipation and he thought the way to keep well was to keep irrigated, and he had what they called the high enema, that they all used to laugh about. They

said it would irrigate your colon, which I think was absurd, but anyway they made strenuous efforts to do so.

Q. Mr. Spalding, at the time your father made the trusts in 1925 and 1934, do you know whether or not it was the general belief of the Bar that a trust creating an adverse interest passed the absolute title out of the donor of the trust?—A. Well, I know, as Mr. Spalding stated in his affidavit, and as I have stated before, we did not hold ourselves out as tax experts at that time. It was not considered nearly as important as it is now. But I do remember that in a general way we in the office, Mr. Spalding and I and perhaps MacDougald, we investigated the law to see as to whether or not this was a good conveyance, changing title to the donee, and as I recall it that was the state of the law as far as I know, at that time.

Q. Do you know whether or not, in the case of Reinecke,
181 Collector of Internal Revenue, vs. Northern Trust Company, 278 U. S. 339, that was passed on?—A. My idea of it, as far as I can recall it, is the state of the law was if you conveyed an estate to an individual, it fell to the donor to make a change or amendment where they did not give the property back. The idea of giving the property back to the donor was negative, and if the interest of the donee was in conflict—I don't remember what word they used to express it—hostile or adverse—that if the donor and the donee had adverse interests in it, the state of the law at that time was that was an absolute gift and the reservation of this power did not put it back in his estate and it was not a part of his estate.

Q. Do you know whether or not, in this case I have referred to, that was decided by the Supreme Court of the United States on January 2, 1929, that that exact point was passed on and was held as you stated it?—A. Yes.

Mr. WALKER. Your Honor, I object to that. As a matter of fact, I think that is a legal conclusion and the Court can pass on that, but recollection is that the City Farmers Bank & Trust Company case specifically showed the distinction between the language.

Mr. SIBLEY. I am not dealing with that case. I am dealing with the Reinecke case.

The COURT. Does it make a great deal of difference, so far as this plaintiff is concerned, what that case or the other holds? If it is admissible at all, wouldn't it be a question of how they interpret the law?

182 Mr. SIBLEY: Except this one fact: The question of good faith is an important element, and I want to show that as the law stood they had a right to rely on the question. It would not have been a mere opinion.

The COURT. There would not be any use to determine by the witness what was actually held. The only thing that would be material would be how they interpret the case.

Mr. SIBLEY. With the further fact that Your Honor might want to know that they had a right to determine that.

The COURT. I can look at the case.

Mr. SIBLEY. I want to tender in evidence this scrap book, for the purpose of reference, of fixing these dates and showing these activities as shown by the press.

Re-cross examination by Mr. CHAS. W. WALKER:

Q. In the fourth paragraph of the trust set up in 1925, at the latter part of it, I read this language: "But if she does not do so" (meaning if she does not dispose of the property by her last will, in the event she has left no children surviving) "then said fund shall revert to me or my estate, and pass to the parties taking the same in like manner as the residuum of my estate shared."—A. Yes.

Q. In the trust set up in 1934, which is an amendment to this original trust, the latter portion of paragraph four reads:
183 If my said daughter should die without leaving a surviving husband, or child or children, or descendants of child or children, and should not dispose of the corpus of said trust fund by last will and testament, then said fund shall go to her heirs and administrators, as provided by law." That latter provision, changing from the first provision, changed the taxability too. If the City Farmers Bank & Trust Company case had not had anything to do with this case, the change from the 1925 language to the 1934 language would have been highly immaterial for tax purposes, wouldn't it?—A. That is something I can't answer, because I haven't made any study of it. That would be a question of law.

Q. Who collaborated with Mr. Spalding in making the amendments of 1934? Did you do that?—A. I am sorry to say that I cannot recall. There may be something in the record that will show I did, but I can't recall that.

Q. In addition to the trusts in favor of Suzanne and Jack, Jr., in 1925, there were two other trusts set up, one in favor of you and one in favor of your mother, were there not?—A. Yes; there was a trust set up in favor of my mother. I never thought there was any trust set up in my favor and I don't think so yet. I mean, I don't thing it put into effect.

Q. Well, look at this estate tax—I mean gift-tax return filed by your father in November 1927, and see if he includes a trust instrument which was in your favor?—A. Yes; I know that he did, but this estate-tax return—Let me state this: that I

184 didn't know that there was any gift tax due on this 1925 gift that Mr. Spalding made, and he didn't know it, as shown by his affidavit. We finally saw that we needed a tax man in our office, a man familiar with taxes, so we secured the services of Mr. Haines Hargrove, who was born and raised at Tifton. He was with the tax firm of Miller & Shevalier in Washington, and I think he came with us in about 1926, about that time; might have been 1927; but he discovered this fact. Mr. Spalding asked him to check all of his past income-tax returns and all of his matters, and he discovered that Mr. Spalding had not made a gift-tax return covering these gifts in 1925, and set out to make one up for Mr. Spalding, and he used our office files to make up this return. He made the returns giving these gifts in trust. The one claim that is shown here was undoubtedly made and executed by Mr. Spalding and executed by me. I did not think it was necessary for me to testify on that, because he had withdrawn his counter claim on that.

Q. I'm not trying to go into that. My purpose, purely and simply, is to show——A. Well, I don't want to say anything prejudicial in this case that might prejudice any other case that you might bring against me.

Mr. WALKER. The purpose is purely and simply to indicate that at the time of the gifts to Suzanna and Jack, Jr., there were two other gifts in trust. The question of the validity of the trusts we won't go into.

Mr. SIBLEY. I thing we said yesterday that he did for one
185 child what he did for all, and let us stipulate that. He is asking one question and is construing it another way.

WITNESS. There was that instrument executed by Mr. Spalding to me at that time.

Dr. Jos. E. HINES, a witness for the Defendants, being first duly sworn, testified as follows:

Direct examination by Mr. JOHN A. SIBLEY:

Q. What is your name?—A. Joseph E. Hines.

Q. What is your profession?—A. Practicing medicine.

Q. How long have you been practicing medicine?—A. Over thirty years.

Mr. SIBLEY. There is no use to go into his training, is there?

Mr. WALKER. No, sir.

Q. Dr. Hines, were you the personal physician of Mr. Spalding?—A. Yes, sir.

Q. Were you also his personal friend?—A. Very friendly, indeed.

Q. Were you members of the same religious faith?—A. Yes, sir.

Q. Were you a member of the same charitable society that he was a member of?—A. Yes, sir.

Q. Were you ever head of that society Mr. Spalding was head of, parish organization?—A. I was a member and he
186 stepped up to the presidency of the combined organization in the community, and I was appointed his successor.

Q. How often did that organization meet?—A. Every Monday night.

Q. During the time you knew Mr. Spalding and during the time he was in Atlanta, how regularly did he meet with the society?—A. Practically every time. I don't recall any absence at all. He was our most regular member.

Q. Up until when?—A. Up until the last five or six months before he died, which was 1938 or 1937. If he was in Atlanta he came. He was off three or four months during that period.

Q. Up until that time he was a regular attendant?—A. Regular attendant.

Q. How long would those meetings hold?—A. Usually about three-quarters of an hour to an hour.

Q. What, if anything, was passed on in these meetings?—A. The work was a charitable affair; people in need who wanted their cases brought up and such disposition made of the cases as the organization thought they were entitled to or should have.

Q. Did the conference there decide on what would be done?—A. Yes, sir.

Q. Did Mr. Spalding take an active part in these meetings?—A. Necessarily; he was an old time member and he was very active in giving his views and suggestions. Hardly a case came up of any nature that we did not ask his opinion of, as to our final disposition of the case.

187 Q. Dr. Hines, did you see him there during the '30's and during the period of time we are talking about here?—A. Yes; I was rather a regular attendant during most of the time. I mean by that, I was certainly there three out of four meetings.

Q. Were you Mr. Spalding's personal physician?—A. For more than twenty years I was his physician when he was in Atlanta.

Q. Did you have anything to do with prescribing his diet?—A. Little of anything to do with it, except to possibly approve it. He discussed his diet with me, and he was of the Battle Creek leanings—if you will allow the expressions—and I expressed the thought at the time that I knew little about the Battle Creek diet: I didn't say what I thought of it, but I never passed on it, and he

was very much interested in the dietary plan of Battle Creek at the time and adhered to it very closely, and from remote times to two or three months before he died he would tell me of some new something Kellog had gotten out, in the way of taking dextrose or a new plan of carrots or something.

Q. Did you check him up regularly?—A. Yes; very regularly.

Q. Was he very prudent and careful about his health?—A. I have never known anybody—man, woman, or child, I might say, that was so interested in keeping well as he was. He often told me that he paid me to come out and see what his condition was and keep him well. I saw him regularly when he was in Atlanta.

188 Q. Dr. Hines, from his age and your knowledge of his condition personally and professionally, would you say that during the period of time starting with 1924 until the summer of 1938 his health was as good or better or worse than a man generally of his age?—A. I think it was better. I know of no one that took as good care of himself as Mr. Spalding and who tried to keep himself in as good shape.

Q. Mr. Smith says I said 1928. I meant to say 1938?—A. I thought you said 1938. I thought he was an unusual man physically all during my period of experience with him, because he tried so hard to keep well.

Q. How was he intellectually?—A. Too smart.

Q. Did you know of these activities that he had in a public way, making speeches?—A. I used to hear of them, and some of the dinners I was invited to.

Q. When he would take the automobile trip in 1937, to Saint Paul and the trip to the races in 1937, to Kentucky, in the automobile, and the trips to make these speeches at these various places, did you as his medical adviser think that he was in physical condition where he could do those things safely?—A. Absolutely; yes, sir. I went to them with him on one or two Conventions, as a delegate, not as a physician.

Q. Dr. Hines, at my request, did you check the record of June 1934, at the St. Joseph Hospital, which has been referred to here this morning?—A. Yes, sir.

189 Q. When did you check that record?—A. About ten days ago.

Q. From that record there is a notation that Mr. Spalding was suffering from myocarditis. What is that?—A. No, sir; it is not in that record. It is myocardia disease. It is a condition of the heart muscle. I think probably all of us here that are past fifty will show some evidence of myocardia involvement. It is not what Colonel Walker says. In my way of determining an inflam-

matory process, this is a myocardia involvement which is the result of time.

Q. Are you drawing a distinction between myocarditis and myocardia disease?—A. Yes; I don't think it should be determined inflammatory.

Q. Did that record say myocardia disease or myocarditis?—A. I am quite sure it says myocardia disease, because I signed it.

Q. What does that mean?—A. I call it time. In other words, as time continues on, we get more or less a stretching of the heart muscle, because of the load we put on it, and as a result of that we get enlargement of the heart, but there is no inflammatory process in this case of Mr. Spalding.

Q. Is that a natural and normal thing for a man of his age?—A. Yes; as we go along we get more or less a stretching of the heart muscle.

Q. Was the condition of his heart better or worse than the ordinary man of his age?—A. I think, as a matter of fact, inasmuch as this heart trouble seems to worry you, he did not die of it.

190 Q. That is not in answer to my question. (Question read by the reporter.)—A. I think it was better for a man of his age, because of the great care he had taken of himself.

Q. What is chronic nephritis?—A. That is a contracted kidney. He very naturally brought out the fact that is a form of Bright's disease. Bright was the first doctor to find out a kidney could be diseased, and as a result of that we took his name and called it Bright's disease. I think in every case as time rolls on you get more or less a contraction of the kidney and more or less an irritation from those toxins and more or less an involvement of the kidney.

Q. Is that a thing usual and customary for a man of his age?—A. Yes, sir; very few people past sixty will not show a contraction of the kidney.

Q. Was his condition better, or worse than the ordinary man of his age?—A. I would say for his age it was less than lots of patients we see.

Q. I believe you stated taking all the factors into consideration, you considered his health better than the ordinary man of his age?—A. Physically, I think he was a marvel.

Q. I want to ask you one other question that you started to answer awhile ago. Mr. Spalding died of a coronary thrombosis, I think you say it is?—A. I think that is what the certificate shows. I was not with him, of course.

Q. But assuming that is true, tell us what that is?—A. It is a blocking of one of the main arteries of the heart.

191 Q. Has that anything to do with this?—A. No; his previous history, in my mind, had no bearing on that. You have heard it called acute indigestion, and we call it a crisis, a cardiac accident.

Q. Is it a thing that just happens?—A. You find it in all ages of people. You have often heard it called acute indigestion; that is what it is.

Q. Dr. Hines, had you ever stated to Mr. Spalding that there was anything the matter with his heart?—A. Mr. Spalding was a very forceful man. He thought very much of his own opinion of his condition, and his ever present symptom was always the same thing, constipation. He discussed very little other conditions with me, except to get opinions. I would tell him his condition was one of time, plus toxemia, and he was set on the question of this intestinal constipation that he had.

Q. Is that one of the cardinal principles that is taught at Battle Creek?—A. I have never been to Battle Creek, but most of us get a little happiness in life by telling people what they should do for constipation, and everybody has it.

Q. The entries on that record when he was examined at the hospital, whom were they made by?—A. The original copy contains the student nurse's notations. The only thing that is by the doctor was the diagnosis and the condition at discharge, which I signed.

Q. Did you treat him when he was at the hospital or check him?—A. I sent him in there. Everything that has happened to him I saw him.

192 Q. Did you send him there in a wheel chair?—A. I don't know. He went in a wheel chair or went out in a wheel chair. As you probably know, most patients are taken in a wheel chair or stretcher. I don't think that had anything to do with his condition, as evidenced by the fact if he was so seriously ill, why did he stay three days and come out? Why did I dismiss him in three days?

Cross-examination by Mr. CHAS. W. WALKER:

Q. Dr. Hines, I did not fully understand your answer awhile ago. Did you discuss with him that he had myocardia disease?—A. No, sir; I did not put any stress on it, except that he had a condition of age and a symptom of wearing out that goes with age, and his intestinal condition.

Q. You did tell him at his age his body was wearing out?—A. I think he knew that without being told.

Q. He was a very intelligent man?—A. Very learned.

Q. He was 78 years of age at that time?—A. I think so.

Q. I believe you stated he was obsessed—— —A. No; I didn't use that expression.

Q. (Continuing.) Or some kind word—he was very conscious of his constipation?—A. He put a great deal of stress on it. That was his presentive symptom.

193 Q. And he knew he had an enlarged kidney called Bright's disease?—A. I don't think his kidneys were enlarged; it was contracted.

Q. You made the entry on that chart of the diagnosis of chronic nephritis, didn't you?—A. Yes, sir.

Q. Am I correct in my information that acute nephritis either dies or gets well, but chronic nephritis seldom is cured?—A. In a way you are correct, depending on the cause of the acute condition. If I am correct in my education that the thing is a matter of time, then your word "acute" would not apply. He could not be cured, if I am right in my personal opinion of it.

Q. If he is 78 years of age and his myocardia disease and his troubles of constipation and has a difficulty in his hip that was caused by a previous blood poisoning, would there be a likelihood that the chronic nephritis would be cured before his death?—A. If it is due to time, as I said, no, of course not, because it is a matter of time; it is a wearing out; it's not an acute disease.

Q. Mr. Spalding was a man of intelligence; he would recognize flaws when he saw them?—A. I think so.

Q. When you say that he was in excellent health or better health than the average person of his age, you are not meaning to say that he was in as good physical condition as a man of fifty?—A. No; I stated a man of his age.

Q. And he was 78 at that time?—A. Yes.

194 Q. Then he had limitations of disease and wearing out of organs of a normal 78-year-old man?—A. I don't know what a normal 78-year-old man is in your interpretation, but he had unusually good faculties. He was an unusually good man physically, and certainly an excellent man for a man, in my opinion, of seventy-odd years of age. Does that answer your question?

Q. I believe so. And if that was his condition at the age 78, then at the age of 80 there would be no likelihood that his condition would be better at the age of 80?—A. No; but there was very little change in the previous 15 years in his physical condition.

Q. And he died in 1938?—A. I believe December 1938.

Q. I believe he was in Florida for at least five or six months of the year—at least five months?—A. Yes, sir; he usually went down in November and came back in time for the races.

*Documentary evidence*

Mr. SIBLEY. The letters that we have identified we will offer.

Mr. SMITH. Letter dated December 30, 1924, from Mr. Spalding to Mrs. Suzanne Schroder.

Letter dated January 2, 1925, addressed to Mr. Spalding, signed "Billy," who was, I understand, Mr. W. H. Schroder.

Letter dated June 16, 1925, from Mr. Spalding to Mrs. Suzanne Spalding Schroder.

195 Letter dated June 16, 1925, from Mr. Spalding to Mr. Jack Spalding, Jr.

Letter dated January 21, 1927, from Mr. John S. Cohen to Mr. Spalding, together with copy of Atlanta Journal of October 20, 1926.

Letter dated May 8, 1930, from Mr. Spalding to Mrs. Suzanne Schroder.

Manuscript prepared by Mr. Jack Spalding in regard to the 32nd National Democratic Convention at Chicago, together with copy of The Atlanta Journal of July 10, 1932, in which the manuscript was reported.

Invitation dated June 10, 1932, to dinner to be held on June 24, 1932, signed by Mr. Spalding.

Letter dated August 25, 1934, from Mr. Spalding to Hughes Spalding.

Letter dated August 28, 1934, from Mr. Spalding to Mrs. Suzanne Spalding Schroder.

Letter dated August 29, 1934, from Mr. Spalding to Mr. Jack Spalding, Jr.

Copy of the Atlanta Constitution of August 16, 1936, containing speech delivered by Mr. Spalding.

Manuscript and address delivered by Mr. Spalding on July 31, 1937, relating to Henry Grady.

Manuscript and address given by Mr. Spalding at a dinner given by him to the Atlanta Historical Society on October 14, 1937.

Book written by Mr. Spalding, containing sketch of the
196 life of Jack J. Spalding, together with a supplement to that book prepared in 1936.

Letter dated September 15, 1937, from James A. Farley to Mr. Spalding.

Leter dated August 25, 1937, from T. C. Northcott to Mr. Spalding.

Telegram dated August 28, 1937, from Mr. Robt. B. Troutman to Mr. Spalding.

Telegram of the same date from his office employees to Mr. Spalding on his 81st birthday.

Form of an invitation dated October 1937, to a dinner of the Atlanta Historical Soeiety, prepared by Mr. Spalding.

Program of a dinner given to Bishop Candler, together with the address delivered by Mr. Spalding at that dinner.

Manuscript of history of the Piedmont Driving Club and Piedmont Park, prepared by Mr. Spalding in 1937.

Pamphlet in which part of the history was published by the Piedmont Driving Club.

Program of a dinner given by Mr. John A. Sibley to Mr. Ernest Woodruff and Mr. Jack J. Spalding in 1936.

Memorandum prepared by Mr. Spalding in 1938 concerning matters to be attended to.

Letter dated December 8, 1938, from Mr. Spalding to Miss Ruth Blair.

Letter dated January 21, 1939, from Dr. Robt. M. Harris to Hughes Spalding.

197 Request for admissions served by plaintiffs on the defendant in this action.

Copy letter dated April 22, 1937, from Hughes Spalding to J. J. Haverty, containing notation to Mr. Jack Spalding.

Mr. WALKER. We offer affidavit of Mr. Jack J. Spalding, dated November 15, 1927, which was attached to his gift-tax return for the year 1925.

*Stipulation*

It was stipulated that if any of the documentary evidence identified was inadvertently overlooked, it might be tendered into the record.

*Motion to dismiss*

Mr. WALKER. We want to make a motion that the plaintiffs' petition be dismissed, on the ground that the plaintiffs have not overcome the two-year statutory presumption that the relinquishment of the power made within the two years of his death was in contemplation of death.

In United States District Court

*Order denying defendant's motion to dismiss*

Filed May 10, 1944

The Motion to Dismiss, filed by the defendant in the above stated matter on March 4, 1944, having been taken under advisement after argument and having been fully considered,

It is ordered and adjudged that said Motion is hereby denied.

This May 10th, 1944.

BASCOM S. DEAVER.
*United States Judge.*

198 In United States District Court

*Order denying defendant's motion for judgment*

Filed May 10, 1944

The defendant in the above stated matter, at the conclusion of the evidence, having made a Motion for Judgment on the ground that the plaintiff did not carry the burden of proof so as to rebut the presumption the the release of the power made by Jack J. Spalding within two years of his death was made in contemplation of death; and full consideration having been given to the motion, it is hereby denied.

This May 10th, 1944.

BASCOM S. DEAVER,
*United States Judge.*

In United States District Court

*Opinion of court*

Filed May 10, 1944

DEAVER, District Judge:

Mr. Jack J. Spalding was born in 1856 and died in 1938. In 1925 he executed two trusts for the benefit of two of his children in the sum of $50,000.00 each, reserving the power, with the unanimous consent of the trustee, the life beneficiary and himself, to amend, change, enlarge or limit, but in no event to revoke the terms of the agreement. In 1934, he enlarged the trusts by adding to each the sum of $50,000.00.

He made these gifts to meet the needs of his children and grandchildren. The gifts were put in trust because of past experience in handling prior gifts and to protect the donees against their own business misadventures and not to retain any benefit to himself. He had a third child to whom he made gifts in similar
199 amounts, following the policy of making gifts to his three children upon the principle of equality.

Donor was a successful attorney and capable business man. At the time of these gifts, he intended them to be complete and absolute and believed that they were so and that the trust propery passed absolutely out of him for all purposes, including estate taxes. His interpretation of the law as then construed justified that belief. He returned and paid gift taxes on the full value of the property.

In 1937, upon being advised for the first time that under the case of City Bank & Farmers Trust Co. vs. Commissioner, 296

U. S. 85, the gifts remained a part of his estate for estate tax purposes, he released the power reserved in the trust instruments. After 1934 he made no other substantial gifts to his children, although at his death he was worth approximately one million dollars, but did from 1921 until his death give to the church and educational and charitable institutions fully as much as the combined gifts to all his children during his lifetime.

At the time the trusts were executed and the power released, he was in average good health for a man of his age.

In making the release he was actuated by the thought of death only to the extent that thoughtful men habitually act with regard to ultimate death and, in 1925, 1934, and 1937, he did not entertain thoughts of death except the general expectation of death that all entertain. He was motivated in making the gifts by the desire to meet the needs of his children and to set aside property for the benefit of them and their families, freed
200 from all claims, tax or otherwise, and he made the release of the power to effect his original purpose in executing the trusts and to take the property out of his estate as he thought he had already done. Neither the execution of the trusts nor the release of the power was done in contemplation of death except in the sense that all men expect to die at some time.

The question in this case is whether the release of the power was made "in contemplation of death."

Congress has provided for gift taxes and estate taxes. Ordinarily, an estate is thought of as the property actually left by the owner of his death. However, in order to prevent evasion of the estate tax, Congress has, for estate tax purposes, defined estate as including a gift made "in contemplation of death." The statute is just a rule by which to separate property which in substance is a part of an estate from that which is not. Under that rule, if a gift in form is in reality a part of an estate, it so remains, notwithstanding the transfer. It is not the transfer which makes the property estate property but it must be estate property in substance before the transfer can be disregarded. The property is classified as estate property or not according to the fact existing at the time of transfer and not by any desire to avoid taxes. The ultimate fact which results in retaining a complete gift in the estate is a special concern about approaching death. A desire to avoid taxes has no legal effect and it has no probative value even as evidence of special concern about death, because in any transfer such a desire exists equally whether the thought of death is special or general. If a special concern about
201 death exists, then a desire to avoid taxes becomes the motive for electing to transfer by gift instead of by will. At that point the statute applies and declares such a transfer to be in

effect a gift after death. However, it still remains true that the special concern about death must exist before the statute is operative. The motive to dispose of property before death and the motive to dispose of it after death, which motives are controlling, must not be confused with a motive to adopt one form of transfer instead of another, which motive may itself arise from a desire to avoid taxes. If the natural, human desire to retain property is overcome by the recognition of approaching death, the motive is one to dispose of property after death, but, if the desire to retain property is overcome by a desire that others have the benefit of it before death and regardless of when the donor should die, the motive is one to dispose of property before death. A desire to avoid taxes may be present in either case but does not affect the result. It simply explains why donor, in attempting to dispose of property after death, put the transfer in the form of a gift.

A gift in contemplation of death is one which, in substance, though not in form approximates a transmission of property from the dead to the living and which affects, for practical purposes, nearly the same result and, therefore, serves as a substitute for a testamentary disposition. Such a gift falls within the same classification as a transfer intended to take effect at or after the death of the transferor. The effect of the gift must be, in substance, approximately the same as if the property had been transmitted by will, and the motive of the donor must have been
202 such as would have induced him to dispose of the property by will.

The Government contends that a transfer made for the purpose of avoiding the tax is necessarily made in contemplation of death and cites the following Regulation:

"A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property or for any other motive associated with death."

That Regulation is broad enough to include the general expectation of death and is, therefore, in partial conflict with the case of U. S. v. Wells, 283 U. S. 102, 115, which holds that the words "in contemplation of death do not refer to the general expectation of death which all persons entertain."

According to that decision, if a donor has no expectation of death, except in that general sense, a gift by him would not be made "in contemplation of death" in the statutory sense. A young man in perfect health, who anticipates that he will live out his normal expectancy, could not be said to have contemplated death, in that limited sense, in making a gift, though he made it

to avoid estate taxes. A donor may contemplate death in the general sense and in that state of mind give away property to avoid estate taxes.

The Wells case says that the determining factor must be found in the transferor's motive and that the question necessarily
203 is as to the state of mind of the donor. "Motive," as used in that case, does not refer to "intention" of the donor to avoid taxes. It refers to an intention or purpose to make in some other manner what amounts, in substance and effect, to a testamentary disposition. That intention, moreover, must grow out of the thought of death in some other sense than that the donor, like all other men, expects some time to die. The Wells case says, "Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition." The motive for making a well grows out of the testator's desire that certain persons have the benefit of his property after his death. A will is made in contemplation of death, without regard to whether death is thought to be imminent or remote. In either event, the testator retains possession and control of his property during his life. A gift deprives the donor of the possession, control and benefit of the property. The tax statute as to gifts refers to the same sort of motive as leads to the making of a will, that is, a desire that donee have the benefit of the property after donor's death, but that motive is limited by statute and must arise from an expectation of death for reasons other than the fact that death at some time is inevitable.

The donor, desiring that certain persons shall have the benefit of his property after his death, must, for that reason, devise some form of gift which will have substantially the same effect as a will. In other words, he must for some reason consider that his death, while not imminent, will occur within a time short enough to make the transfer of the use and
204 control of the property for that period comparatively unimportant. In such a case the donor, in practical effect, makes a will, but puts it in the form of a gift so as to accomplish substantially the same result without subjecting his estate to the estate tax. U. S. v. Wells, 283 U. S. 102, 117; Igleheart 1. Commissioner, 77 F (2) 704, 709 (5th Circuit).

In Commissioner v. Wilder's Estate, 118 F (2) 281, 282, the court said:

"The taxability of a transfer is not to be determined by the refinements of conveyances or the technicalities of contracts, but by comparing the substance and practical effect of what was done with the standards set up by the taxing Act. Helvering v. Hallock, 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 604, 125 A. L. R. 1368. This Act aims to tax the transfer of a decedent's estate at his death,

and to include in his estate the value of all property which by previous transfers has been so arranged as to pass to others at his death otherwise than through his personal representatives, when he retains it substantially or beneficially until his death."

In Millikin v. U. S., 283 U. S. 15, 23, the court quoted a regulation, as follows:

"The words 'in contemplation of death' do not refer to the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death wherever
205 the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty."

The Court then said:

"It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death."

The value which is included in the estate is the value of the transferred property at the death of the donor. If a man in the prime of life, with no expectation of death except that death at some time is inevitable, made a gift for the very purpose of avoiding at some time the estate tax, then continued in life for fifty years, it cannot be reasonably said that Congress intended to follow that property for a half century and include its value at the death of the donor in his estate. If such gift by one man happened to be of property consumed in the use before donor's
206 death, it would have no value to be included in his estate, whereas if such a gift by another man was of property not consumed in the use, its value would be included in his estate. Such construction would lead to inequality of taxation, depending upon the character of property. Moreover, such a gift would in no sense be a substitute for a will, motivated by a desire that the donee have the benefit of the property after the donor's death. It would not accomplish or be designed to accomplish, in substance, the same result as a will. The statute did not intend to prevent a gift for the purpose of avoiding estate taxes but did intend to retain in the estate property transferred in form by a gift, but in fact by a will.

Congress has not undertaken to penalize a desire or motive to avoid taxes, or an effort to avoid taxes in any legal way. In fact, a desire or intention to avoid taxes, if legally possible, might well be assumed in any transaction. On the other hand, Congress by implication recognizes the existence of the well-nigh universal desire and purpose to handle transactions in such a way as legally to avoid taxes. Accordingly, Congress simply enacted that certain kinds of transfers should not have such legal effect.

In this case the donor was a lawyer and presumably was acquainted with tax statutes and the court decisions construing tax statutes. He made the 1925 and 1934 trusts for reasons associated with continued life and not in contemplation of death in the sense of the statute. He probably made them purposely in such form as would avoid estate taxes under the law as construed
207 at that time. This he had a legal right to do, the transfers not being made in contemplation of death except in the general sense. When his attention was called to a construction of the law which would leave the property in his estate for tax purposes, he released the power. He did that, no doubt, to make effective his original design to take the property out of his estate. He had a legal right to do that, unless his motive in executing the release grew out of a desire to effect in substance a testamentary disposition of the property; that is, a desire to make the property available for the benefit of the donees after his death. His whole purpose in executing the trusts originally was to give the donees the benefit of the property during his life without waiting until his death. The release placed the property irrevocably for their benefit during his life. He made the release, not to afford them the use of the property after his death substantially as if he had made a will, but for the purpose, without regard to when his death might occur, of taking the property out of his estate. He had a right to do that, if he was not moved to execute the release by the thought of approaching death, that is to say, by the thought that in a comparatively short time he would be forced to surrender ownership, whether by gift or will or otherwise, because he would be dead and that he desired the donees to have the property after his death and that his remaining time was short enough to render the control reserved by the power relatively unimportant, and that its release would in substance pass the property to the donees for their benefit after his death. His purpose to avoid estate taxes is not controlling. If he made the release in contem-
208 plation of death in the statutory sense, the estate is subject to the tax, even if he had not had the tax in mind; and if the release was not made in contemplation of death, in some special sense, the estate is not subject to the tax, even if he did intend to

avoid the tax. The question is whether he made the release as a practical substitute for a testamentary disposition.

From the evidence in this case there appears no reason to think that the donor's age or physical condition had anything to do with his decision to execute the release. He had formed the trusts for seasons associated with life and without regard to his own death, except in the sense that all men must die some time, and, as he had a right to do, he put the transfers in a form which, under the law as then construed, he thought took the property out of his estate. He made the release, not because he had in mind thereby to effect substantially a testamentary disposition in a different form, but because he desired to take the property out of his estate as he thought he had already done. He was not contemplating his death, except in the general sense, but was motivated by what he considered a change in the law, and made the release to effect his original intention without regard to when his death might occur. In the same situation he would probably have made the release forty years ago.

As a basis for its contention that, regardless of other considerations, the intention to avoid the tax concludes the question of taxability, the government relies upon certain cases which do not necessarily support that position. The Wells case does
209 not so decide. Another case is First Trust & Deposit Co. v. Shaughnessy, 134 F(2) 940, in which the court cited the Wells case and said that where there is one desire to dispose of property after donor's death and another desire to dispose of it before his death, the question of estate tax depends upon which motive preponderates. However, the court said also in that case that the plan devised clearly amounted to a post mortem disposition. In the present case, there was no desire to make a post mortem disposition. Neither the original gifts nor the release of the power amounted to a substitute for a will. Since the release did not amount, in effect, to a disposition of property after donor's death, the fact that he made the release to avoid estate taxes does not create the necessity of weighing motives to dispose of property before and after death.

In the Bowers case, 68 F (2) 916, the court said the gift was "in fact made in contemplation of death, for it was a substitute for a will." On page 924 of the opinion are found these words, "When the Wells case said that the motive to escape estate taxes must predominate," etc. I do not read the Wells case so to say. The Wells case was not comparing a motive to avoid taxes with some other motive but was weighing a motive to make, in effect, a testamentary disposition against a motive to make a gift associated with continued life. That case, after stating that the statute does not refer to the general expectation of death which all

entertain, says in the next sentence, "It must be a particular concern giving rise to a definite motive." The government in the present case assumes that a motive to avoid estate taxes is
210 identical with a motive to make a testamentary disfer made in contemplation of death" and the Wells case does not so hold. The statute refers to a "transfer made in contemplation of death" and the Wells case says those words mean something other than general expectation of death, and require a special concern sufficient to generate a desire to dispose of property after death. It is a special contemplation of death under circumstances which cause the donor to desire to dispose of his property as ordinarily he would do by will. If, in that state of mind, he devises some form of transfer which is substantially a substitute for a will, then the transfer is within the statute. A will may be made in contemplation of death in the general sense, but a transfer under the tax statute must amount to a testamentary disposition which is motivated by contemplation of death in some other and special sense.

In Farmers' Loan & Trust Co. v. Bowers, 98 F (2) 794, the court said:

"It may be true that transfers made by one in good health and in the prime of life were not intended by Congress to be within the statute merely because the transferor had the saving of death duties in mind. But motives such as escaping estate taxes or anticipating testamentary provisions when actuating an old man in failing health who was giving away nearly all his remaining property certainly bring the transfers within a statute aimed at reaching substitutes for testamentary dispositions and preventing evasion of estate taxes."

211 That language probably means only that the facts in that case showed a testamentary disposition made in another form for the purpose of avoiding estate taxes. In view of the first sentence quoted, the court did not mean that a motive to avoid estate taxes alone brings a transfer within the statute. In that case the transfer was held to be a substitute for a will. There was an old man in failing health who was giving away nearly all his property and doing it in a way which served substantially as a will. In the present case, the donor, though old, was not considering his approaching death in the sense of the statute and he retained in his estate nearly a million dollars which he did not attempt to dispose of by a transfer in the nature of a will. If a transfer is not a substitute for a will, it is not covered by the statute.

Congress, no doubt, assumed that normal human instincts would prevent persons who have no reason to anticipate death except in the general sense, from absolutely divorcing themselves from the ownership and control of their property just to avoid estate

taxes. At any rate, Congress did not attempt to legislate with reference to that kind of situation. However, Congress did consider that persons who, by reason of age, bad health or any other cause, realize that their own enjoyment of their property is approaching the end, would naturally avoid estate taxes if they could do so legally and would probably devise methods of doing so which would enable them to direct disposition of their property after death and would for practical purposes serve as an approximate and fairly satisfactory substitute for a will. Congress did
212 legislate with reference to that situation and it is only in some such special circumstance in which the thought of approaching death generates a desire to make a post-mortem disposition of property, that the statute was intended to apply. If Congress had intended the statute to apply to a transfer made for the purpose of avoiding the tax, without more and regardless of all other circumstances, it probably would have said so. Instead, Congress included transfers made "in contemplation of or intended to take effect in possession or enjoyment at or after his death." A transfer to take effect in possession or enjoyment at death is not a will but the result accomplished so closely approximates that of a will as to make such transfer available, for practical purposes as a substitute for a will. Likewise, a transfer in contemplation of death, though it takes effect before death, may be employed as a practical substitute for a will. Whether a transfer before death is to be regarded as a substitute for a will depends upon the state of mind of the donor with reference to his death. To make it a substitute, the donor's thoughts as to his death must lead him to the belief that in view of the time he has to live the transfer will have substantially the same effect as a will. However, if the facts show that the donor made a gift simply to avoid estate taxes but that the only consideration he gave to the fact of his death was to be conscious of inevitable death at some time, then the transfer is not to be regarded as a substitute for a will, made in contemplation of death in the statutory sense.

In this case, while the release was made to avoid estate taxes, the donor was not moved to make it by any expectation of death
213 except in the general sense. He made the original gifts because of what he considered the needs of his children in his life time. He made them, as he thought, in such a way as to avoid the tax, but not because he thought of his death in any special sense and not as any substitute for a will. The release likewise was made to accomplish his original purpose without reference to when he might die and was not, in its effect, a substitute for a testamentary disposition.

In Denniston v. Commissioner, 106 F. (2) 925 (3rd Cir.), it was held that a desire to avoid estate taxes, standing alone, does not constitute the mental state intended by the phrase "in contemplation of death." In other words, the "motive" intended by the statute to be regarded by the courts as controlling is not a motive to avoid estate taxes but is a motive to make a testamentary disposition growing out of special considerations in the donor's mind affecting the probability of his death.

The burden has been carried in this case and the plaintiff is entitled to recover.

In United States District Court

*Findings of fact*

(Filed May 10, 1944)

1. Plaintiffs' testator Jack J. Spalding was born on August 29, 1856, and died on December 8, 1938, testate, a resident of Fulton County, Georgia. Plaintiffs are the duly qualified and acting Executors of his Will.

2. The Commissioner of Internal Revenue, on audit of said return, included the corpora of two trusts established on June 15, 1925, in favor of the donor's daughter Suzanne and son Jack, as enlarged by amendment on August 26, 1934, in the gross estate of Mr. Spalding, and assessed an additional tax against Mr. Spalding on account of the inclusion of said corpora in said trusts.

3. The amount of the additional tax assessed by the Commissioner on account of the inclusion of the corpora of said trusts was $66,114.22 principal with interest thereon from March 8, 1940, at 6% per annum. Of this sum, the amount of $11,801.17 principal was payable, and was paid, to the State of Georgia, pursuant to the Revenue Act of 1926. The balance of $54,313.05 plus interest thereon at 6% per annum from March 8, 1940 to July 24, 1942, or a total of $62,092.91, was, on July 24, 1942, paid by plaintiffs to defendant.

4. Plaintiffs duly filed claim for refund of the amount so paid and complied with all conditions precedent for bringing of this suit against defendant, and, after expiration of six months from the filing of said claim, brought this suit against defendant.

5. Mr. Spalding, a successful attorney and capable business man, followed the policy of making gifts to his three children upon the principle of equality. On or about 1912, he made a gift of a home to his son Hughes and to his daughter Suzanne of the value of $15,000 each on the occasion of their marriages. Soon thereafter,

he made a gift in a similar amount of stock in a local corporation to his son Jack, to enable him to enter business. In 1918, he made another gift of $18,000, either in cash or its equivalent, to each of his three children. All of these gifts were in fee simple.

215 6. On June 15, 1925 he made gifts in trust to his daughter Suzanne and to his son Jack, Jr., of property of the approximate value of $50,000 each. On August 26, 1934 he added to both trusts by amendment approximately $50,000 in the case of Jack and in the case of Suzanne $50,000 less $19,000, the value of a home which he gave to her in fee simple, and at that time he gave to his son Hughes $50,000. On June 15, 1925 he set up two additional trusts which are not in issue in this case, one was to his son Hughes, as trustee, with the income to Hughes for life and thereafter the income to go to the children of Hughes Spalding. The property so transferred had a value of about $50,000 at that time. The other trust was to the Atlanta Trust Company for Mrs. Elizabeth H. Spalding, the wife of Jack J. Spalding, and was in a similar amount as to value.

7. The trusts established on June 15, 1925 and enlarged on August 26, 1934 in favor of Suzanne and Jack, Jr., and the gift to Hughes were made under the following circumstances: Prior to 1924, Suzanne had entered a partnership venture with her husband under the name of Albany Oil Company. That business, on account of losses in inventory values and the cancellation of contracts, by the Government, met with financial disaster in the 1920's, causing Suzanne to lose all of her investment, including her home, and leaving her liable jointly with her husband for bank debts in the sum of $80,000. In 1924, Mr. Spalding advanced $10,000 to get Suzanne relieved of the bank obligation. After this business misfortune, Suzanne's husband was without

216 means to support his wife and their five children, Mr. Spalding's grandchildren. Jack had invested the funds his father had given him in a local enterprise which had been liquidated, and he and his family had moved to Mexico City. The remuneration from his work was insufficient to support his family, and Mr. Spalding gave him a monthly allowance. Prior to 1934, Mr. Spalding's oldest son Hughes had invested heavily in real estate and in the stock market and because of losses and shrinkage in value brought about by the depression of 1929, which continued through the thirties, he became insolvent. Mr. Spalding gave his son $50,000 to help him out, and at the same time purchased from his son $90,000 of real estate which had originally cost $110,000, and applied the purchase money on his debts. It was the time that this gift was made to his son Hughes that Mr. Spalding added like amounts to the trusts in favor of Jack and Suzanne.

except that Suzanne was given in fee simple title to the home in which she lived at the value of $19,000.

8. The gifts of June 15, 1925 and August 26, 1934 were made by Mr. Spalding to meet the pressing necessities of some of his children and to equalize the gift to others and out of the desire to relieve the needs and to make secure the maintenance of his children and the education and support of his grandchildren. The gifts were put in trust and not delivered to the children because of past experience in handling prior gifts. Suzanne and Jack had lost such gifts in unsuccessful business enterprises, and Mr. Spalding, in establishing the trusts, desired to protect them
217 against their own business misadventures and not to retain any benefit, directly or indirectly, to himself.

9. At the time the trusts were created in June 1925 and enlarged in August 1934, Mr. Spalding believed that the gifts were complete and absolute and so intended, and that the trust property passed absolutely out of him for all purposes, including estate taxes. Under the law as he then interpreted it, he was justified in that belief. He returned and paid gift tax upon the full value of the gifts in 1925 and 1934, and his intentions and purposes were to make the gifts absolute and complete.

10. On or about April 27, 1937, upon being advised for the first time that under decision of City Bank & Farmers Trust Company v. Commissioner, 296 U. S. 85 (decided some eighteen months after the gift of August 26, 1934) the gifts remained a part of Mr. Spalding's estate and would be included in his estate for estate tax purposes, Mr. Spalding on May 1, 1937 had prepared and executed an instrument renouncing the power reserved in said trust. When the trusts were created and enlarged by amendment, and on May 1, 1937, Mr. Spalding was in average good health for a man of his age.

11. Upon the renunciation of the power in said deeds of trust on May 1, 1937, Mr. Spalding, neither then nor thereafter, made any other substantial gifts to his children, although at that time and at the time of his death he was worth approximately one million dollars. In fact, he made no substantial gifts to his children after 1934, although from 1920 until the time of his death
218 he gave to the Church and to educational and other charitable institution fully as much as the combined gifts to all of his children during his lifetime.

12. Mr. Spalding made the releases of May 1, 1937 for the purposes of putting the trusts in the condition, which he had thought they were in when made, so that they would not be a part of his estate for estate tax purposes. However, in making such releases Mr. Spalding was actuated by the thought of death only to the extent that thoughtful men habitually act with regard to ulti-

mate death, and he did not in 1925, 1934, and 1937 entertain thoughts of death except the general expectation of death that all entertain.

13. He was motivated in making the gifts by his desire to meet the necessities of his children and to set aside property solely for the benefit of them and their families, freed of all claims, tax and otherwise, and the release of the power on May 1, 1937, falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934.

14. Neither the creation of the trust in 1925 nor its enlargement by amendment in 1934 nor the renunciation of the power on May 1, 1937 was done or made in contemplation of death in the statutory sense.

This the 10th day of May 1944.

BASCOM S. DEAVER,
*United States Judge.*

219 *Conclusions of law*

1. The Court has jurisdiction of the parties and the subject matter.

2. An intent to avoid an estate tax standing alone and without more is not conclusive that a gift or a release of a power was made in contemplation of death in the statutory sense.

3. Neither the original gifts nor the release of the power in this case was made in contemplation of death within the meaning of the statute.

4. Plaintiffs are entitled to recover from the defendant $62,092.01 principal, together with interest thereon at six per cent (6%) per annum from July 24, 1942, less the amount incurred as a gift tax on account of the renunciation on May 1, 1937, of the powers in said trust instrument.

This the 10th day of May 1944.

BASCOM S. DEAVER,
*United States Judge.*

In United States District Court

*Judgment*

Filed May 10, 1944

The above stated case having been submitted to the Court without a jury, and the Court having made and filed findings of facts and conclusions of law, and the Court having found, and hereby finding, that the plaintiffs are entitled to recover from defendant

the sum of $62,092.01 as an overpayment of the estate tax on the estate of Jack J. Spalding paid to defendant, with interest
220 thereon at 6% per annum from July 24, 1942, to the date of this judgment, amounting to $6,685.24, or a total of $68,777.25, and that defendant is entitled to set off against said sum the sum of $11,619.46 as a gift tax owing by said Jack J. Spalding, with interest thereon at 6% per annum from March 15, 1938, to the date of judgment, amounting to $4,289.52, or a total of $15,908.98.

It is therefore considered, ordered, and adjudged that the plaintiffs, Trust Company of Georgia and Hughes Spalding, Executors of the Estate of Jack J. Spalding, deceased, do have and recover from defendant, Marion H. Allen, Collector of Internal Revenue, the principal sum of $52,868.27, with future interest thereon at the rate of 6% per annum until paid.

The Court hereby certifies that there was probable and reasonable cause for the act of defendant, the Collector of Internal Revenue, and that he acted under the direction of the Secretary of the Treasury, or other proper officer of the government in demanding and collecting from plaintiffs the internal revenue tax, for the refund of which this judgment is rendered.

Plaintiffs are entitled to recover, and shall recover, $_____ as costs.

Entered in open court this 10th day of May 1944.

BASCOM S. DEAVER,
*United States Judge.*

221 In United States District Court

*Notice of appeal*

Filed Aug. 2, 1944

Notice is hereby given that Marion H. Allen, Collector of Internal Revenue, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 10th day of May 1944.

T. HOYT DAVIS,
*United States Attorney,*
By HENRY S. BARNES,
*Asst. United States Attorney,*
*Attorney for Appellant Marion H. Allen,*
*Collector of Internal Revenue.*

Address: 303 Post Office Building, Macon, Georgia.

In United States District Court

*Designation of the contents of the record on appeal*

Filed Aug. 16, 1944

The Clerk of said Court is hereby informed that Marion H. Allen, the appellant, designates the entire record in this Court as being necessary in the record on appeal, which includes the bill of complaint with amendments and exhibits, answers with amendments, all motions made by the defendant, the Court's rulings thereon, transcript of evidence together with exhibits, the Court's findings of fact and conclusions of law, the judg-
222 ment, the notice of appeal, and this designation of the contents of the record on appeal.

CHAS. W. WALKER,
*Assistant U. S. Attorney.*

Service of a copy of the foregoing designation of the contents of the record on appeal in said cause is acknowledged.
This the 15th day of Aug. 1944.

SPALDING, SIBLEY & TROUTMAN,
JOHN A. SIBLEY,
*Counsel for Trust Company of Ga., et al, as executors of the Estate of Jack J. Spalding, deceased, Appellee.*

In United States District Court

*Amendment to the designation of the contents of the record on appeal*

Filed Sept. 16, 1944

In order to eliminate from the record matters which are not material to the consideration of the case by the Appellate Court, the Clerk is hereby directed to omit from the Record, to be forwarded to the Circuit Court of Appeals, the following instruments:

223 1. The Response filed by Marion H. Allen on October 16, 1943, requesting and obtaining Sixty (60) Days additional time within which to answer the Request for Admissions. The designated documents in the request were admitted by the defendant.

2. The Amendment filed by Marion H. Allen on March 24, 1943, setting up a defense by way of off-set or recoupment because of trusts which had been set up in favor of Hughes Spalding and

Mrs. Elizabeth H. Spalding. The Court permitted the defendant to withdraw this Amendment by its order dated April 13, 1944.

3. Plaintiff's Reply to the Amendment described hereinabove in Item 2.

CHAS. W. WALKER,
*Assistant U. S. Attorney.*

It is certified that consent has been obtained from Appellee's Attorneys for the filing of this Amendment, and a copy of this Amendment is being this day forwarded to them.

This September 16th, 1944.

CHAS. W. WALKER,
*Assistant U. S. Attorney.*

224 In United States District Court

*Order*

It is ordered that the Clerk of this Court shall send to the U. S. Circuit Court of Appeals the original documentary evidence which was introduced into evidence on the trial of the above case, the documents being enumerated by the Court Reporter at the end of the transcript of record.

This 11th day of September 1944.

BASCOM S. DEAVER.

[Clerk's certificate to foregoing transcript omitted in printing.]

225 In United States Circuit Court of Appeals, Fifth Circuit

[Title Omitted.]

*Argument and submission*

March 21st, 1945

On this day this cause was called, and, after argument by Carlton Fox, Esq., Special Assistant to the Attorney General, for appellant, and John A. Sibley, Esq., for appellees, was submitted to the Court.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11160

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE, APPELLANT

*v.*

TRUST COMPANY OF GEORGIA, AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED, APPELLEES

Appeal from the District Court of the United States for the Middle District of Georgia

May 3, 1945

Before WALLER and LEE, Circuit Judges, and LONG, District Judge

*Opinion of the Court*

Filed May 3, 1945

WALLER, Circuit Judge. When the settlor, Jack J. Spalding, in 1937, at the age of eight-one and within two years of his death, relinquished the power to amend, change, enlarge, or limit the terms of two trust agreements made in 1925, irrevocably
226 conveying securities in one instrument to a trustee for his daugther and in the other for one of his sons, was such relinquishment made "in contemplation of death" under Sec. 302, subsections (d) (1) and (d) (3), Revenue Act of 1926, as amended by Sec. 401, Revenue Act of 1934, now Sec. 811d of Title 26, U. S. C. A.[1]

In 1925 Mr. Spalding, being a man of considerable means, active, and in good health, discovered that his daughter, Suzanne (Mrs. Schroeder), her husband, and their five children were in impecunious circumstances due to serious financial reverses. They were living in a small garage apartment in Miami where they had gone after the oil mill venture of Mr. and Mrs. Schroeder in

[1] Sec. 302 (d) (1) "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

"(3) The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;"

Albany, Georgia, had been wrecked by the cancellation of contracts, and the catastrophic fall in prices consequent upon the cessation of hostilities of World War I. The settlor's son, Jack, had also engaged in unwise and improvident business ventures, with the result that he was in hard financial circumstances. To relieve their situations Mr. Spalding created two trusts of the type usually referred to as "spendthrift trusts," wherein he sought to protect these two children and their children from privation and want, as well as from the results of any repetition of their previous business misadventures. In each of the two trust agreements, which were between him and a trust company, as trustee, he irrevocably conveyed to the trustee corporate stock then having a value of $50,000.00. In 1934 he increased these two trusts by additional gifts of personal property, of the value of $50,000.00.

There is not, and there could hardly be, any serious dispute that these two trusts, established in 1925 and increased in 1934, were: (a) to protect the children against want and against their own business mistakes; (b) executed with the intention on the part of their father to make the gifts absolute; and (c) not executed either in 1925 or 1934, in contemplation of death, either in the actual sense of one who looks over Jordan and sees the sweet chariot swinging low and a band of angels coming after him, or in the synthetic or presumptive sense. The lower Court so found with abundant evidence to support the finding.

But the 1925 trust agreements contained the following provision, which was also brought forward in the 1934 amendment:

227 "During my life, by the unanimous consent of the said trustee, my said daughter and of myself, the terms of this agreement may be amended, changed, enlarged, or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked."

The state of the law was such that at the time of the trust agreements the language of subparagraph (d) (1) of Sec. 302 relating to a reservation of a power of amendment "either by the decedent alone or in conjunction with any other person" was thought to reach situations only where the decedent or trustee or some other person not adversely interested might, by amendment, reduce, or take away from the cestui que trust, the right to the enjoyment of the property of the trust estate.[2] But the law was not that of the Medes and Persians which altereth not, and in Helvering, Commissioner, v. City Bank, 296 U. S. 85, it was held that the term "in conjunction with any other person" should be construed to mean any person and that the term included the bene-

[2] Reinecke, Collector, vs. Northern Trust Company, 278 U. S. 339.

ficiary or persons having an adverse interest, regardless of the veto power of the beneficiary in the trust agreement. That decision, rendered November 11, 1935, was called to the attention of Mr. Spalding, Sr., in May 1937, by his son Hughes, who was an attorney in the settlor's law firm.

Thereupon the elder Spalding relinquished the power to change, alter, or modify[1] the trust indenture, but Mr. Spalding died within two years of the date of making the relinquishment, causing the statutory presumption of Sec. 302 (d) (3) to arise that the relinquishment was made in contemplation of death. The tax is "upon the transfer of the net estate of every decedent" and not upon the net estate, the value of the transfer being measured, of course, by the net value of the estate passing from the decedent to his heirs, devisees, or legatees. Secs. 302 (d) (1) and 302 (d) (3) of the Act also undertake to prescribe certain tests in determining the gross estate of a decedent. For instance, Sec. 302 (d) (1) provides, in substance, that any interest of the estate of the decedent of which he has theretofore made a transfer, by trust or otherwise, where the enjoyment of such interest at the time of his death was subject to any power of the decedent, either alone or in conjunction with any other person, to alter, amend, or revoke the transfer or trust, or where the decedent relinquished such power to alter, amend, or revoke in contemplation of his death, such an interest shall be included in the gross estate of the decedent.

228 Sec. 302 (d) (3) provides that the relinquishment of any such power, made without consideration and within two years prior to his death, which affects the interest of a transferee or beneficiary of a value at the time of death in excess of $5,000.00, shall, to the extent of such excess, be deemed to have been made in contemplation of death within the meaning of the Act unless the contrary be shown.

So when Mr. Spalding died within two years from the date of the relinquishment of the power to amend, which could only be done upon the unanimous consent of his daughter, the trustee, and himself, the Commissioner of Internal Revenue, invoking the above-mentioned subsections, required the inclusion in the gross estate of the decedent the amount of the interest which the decedent had theretofore irrevocably transferred to the trusts for the benefit of his son and daughter and their children.

The trustee paid the tax under protest and successfully sued in the District Court of the Middle District of Georgia for the recovery of the tax so charged and collected.

[1] The language of the relinquishment was:
"From and after this date said trust indenture as hereby modified shall not in any manner whatsoever or to any extent whatsoever be subject to any change, alteration or modification in any capacity, alone or in conjunction with other person or persons whatsoever."

After making the finding of facts shown in the margin,[1] the District Court then concluded as a matter of law: (1) That an intent to avoid an estate tax, standing alone, is not conclusive
229 that a gift or a release of a power was made in contemplation of death in the statutory sense; (2) That neither the original gifts nor the release of the power in this case was made in contemplation of death within the meaning of the statute; and

[1] "7—The trusts established on June 15, 1925, and enlarged on August 26, 1934, in favor of Suzanne and Jack, Jr., and the gift to Hughes were made under the following circumstances: Prior to 1924, Suzanne had entered a partnership venture with her husband under the name of Albany Oil Company. That business, on account of losses in inventory values and the cancellation of contracts, by the Government, met with financial disaster in the 1920's, causing Suzanne to lose all of her investments, including her home, and leaving her liable jointly with her husband for bank debts in the sum of $80,000. In 1924, Mr. Spalding advanced $10,000 to get Suzane relieved of the bank obligation. After this business misfortune, Suzanne's husband was without means to support his wife and their five children, Mr. Spalding's grandchildren. Jack had invested the funds his father had given him in a local enterprise which had been liquidated, and he and his family had moved to Macon City. The remuneration from his work was insufficient to support his family, and Mr. Spalding gave him a monthly allowance. Prior to 1934, Mr. Spalding's oldest son Hughes had invested heavily in real estate and in the stock market, and because of losses and shrinkage in value brought about by the depression of 1929, which continued through the thirties, he became insolvent. Mr. Spalding gave his son $50,000 to help him out, and at the same time purchased from his son $90,000 of real estate which had originally cost $110,000, and applied the purchase money on his debts. It was the time that this gift was made to his son Hughes that Mr. Spalding added like amounts to the trusts in favor of Jack and Suzanne, except that Suzanne was given in fee simple title to the home in which she lived at the value of $19,000.

"8—The gifts of June 15, 1925 and August 26, 1934 were made by Mr. Spalding to meet the pressing necessities of some of his children and to equalize the gifts to others and out of the desire to relieve the needs and to make secure the maintenance of his children and the education and support of his grandchildren. The gifts were put in trust and not delivered to the children because of past experience in handling prior gifts. Suzanne and Jack had lost such gifts in unsuccessful business enterprises, and Mrs Spalding, in establishing the trusts, desired to protect them against their own business misadventures and not to retain any benefit, directly or indirectly, to himself.

"9—At the time the trusts were created in June 1925, and enlarged in August 1934, Mr. Spalding believed that the gifts were complete and absolute and so intended, and that the trust property passed absolutely out of him for all purposes, including estate taxes. Under the law as he then interpreted it, he was justified in that belief. He returned and paid gift tax upon the full value of the gifts in 1925 and 1934, and his intentions and purposes were to make the gifts absolute and complete.

"10—On or about April 27, 1937, upon being advised for the first time that under decision of City Bank & Farmers Trust Company v. Commissioner, 296 U. S. 85 (decided some eighteen months after the gift of August 26, 1934) the gifts remained a part of Mr. Spalding's estate and would be included in his estate for estate tax purposes, Mr. Spalding on May 1, 1937, had prepared and executed an instrument renouncing the power reserved in said trust. When the trusts were created and enlarged by amendment, and on May 1, 1937, Mr. Spalding was in average good health for a man of his age.

"11—Upon the renunciation of the power in said deeds of trusts on May 1, 1937, Mr. Spalding, neither then nor thereafter, made any other substantial gifts to his children, although at that time and at the time of his death he was worth approximately one million dollars. In fact, he made no substantial gifts to his children after 1934, although from 1920 until the time of his death he gave to the church and to educational and other charitable institutions fully as much as the combined gifts to all of his children during his lifetime.

"12—Mr. Spalding made the releases of May 1, 1937 for the purposes of putting the trusts in the condition, which he had thought they were in when made, so that they would not be a part of his estate for estate tax purposes. However, in making such releases Mr. Spalding was actuated by the thought of death only to the extent that thoughtful men habitually act with regard to ultimate death, and he did not, in 1925, 1934, and 1937 entertain thoughts of death except the general expectation of death that all entertain.

"13—He was motivated in making the gifts by his desire to meet the necessities of his children and to set aside property solely for the benefit of them and their families, freed of all claims, tax and otherwise, and the release of the power on May 1, 1937 falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934.

"14—Neither the creation of the trust in 1925 nor its enlargement by amendment in 1934 nor the renunciation of the power on May 1, 1937, was done or made in contemplation of death in the statutory sense."

(3) That judgment should be entered for the recovery of the taxes paid.

All of the finding of facts from 7 through 13, inclusive, have substantial support in the evidence. Finding No. 14 to the effect that the renunciation of the power to amend, executed on May 1, 1937, "was not made in contemplation of death in the statutory sense," is supported by the circumstances and facts in evidence insofar as the actualities are concerned, but in view of the artificialities injected into the case a mixed question of law and fact is involved, which calls for further consideration and for some elaboration.

Much has been written as to what is meant by the phrase "in contemplation of death" in connection with: (a) The contemplation of death of one who is in extremis and who believes that death is imminent; (b) The general expectation of death that all men entertain; (c) The statutory contemplation of death attributable to all who die within two years after making certain gifts, or after relinquishing the powers relating to the management thereof. But now the Appellant urges that there is still another process by which one can think his estate into taxation if he, in making a gift, had in mind the saving of taxes to his heirs or legatees. It seems to be a sort of synthetic contemplation of death attributable to the man who, in the exercise of proper and legal motives, makes a gift or relinquishes a power which he hopes will have the consequence of freeing his estate from the payment of death taxes.

An explanation of the first two of the aforementioned types of contemplated dissolutions is hardly necessary because most of us have had contacts with the Grim Reaper, both proximate and remote, and have contemplated death in each of such as-
230 pects; but when it is asserted that a person acts in contemplation of death in the relinquishment of a power to alter a transfer previously made for the protection of his children and the equalization of his bounty merely because he wishes the transfer to have the tax consequences that he originally intended, to wit, the freedom from death taxes against his estate and his heirs, a novel concept is projected into the brain of the uninitiate. Perhaps some, to whom the idea seems bizarre, will better understand the development of this concept by considering the analogy of such a mental process to the mental process attributable to one making a will or a testimentary disposition of his property. It is deemed that the making of a will involves a contemplation of what will occur upon the testator's death, as well as the methods whereby his wishes and desires can be carried into effect after his death. So, then, it is not a far step of the taxgatherer from the

recognized position that a man in making a testamentary disposition of his property does so in contemplation of death to the presently debatable position that the same thing would be true when a man undertakes by a gift or by the relinquishment of a power to avoid taxes that would otherwise occur upon his death. When the dominant motive of a donor in the relinquishment of such a power was to avoid taxes that would otherwise result upon his death, the Appellant insists that such donor was necessarily acting in contemplation of death, regardless of what may have been the prime purpose of an original gift or the state of health of the donor at the date of the making of such gift.

We will keep in mind that: (1) the estate tax is laid upon the transfer of property of the deceased which occurs upon his death either by operation of law or by testamentary disposition; (2) the tax is laid only upon the property which the decedent owned at the time of his death or over which he then retained the power of control; (3) if a gift is made within two years of the death of the donor a presumption arises that it was made in contemplation of death; (4) if in any transfer, by trust or otherwise, the enjoyment is subject to a retained power by the donor, by himself or in conjunction with another, to alter, amend, or revoke, such a trust or transfer will be considered in the nature of a testamentary disposition; (5) if the donor relinquishes such power to amend, alter, or revoke the enjoyment of the gift within two years of his death, it will be presumed that such relinquishment was in the nature of a testamentary disposition and made in contemplation of death; (6) if any gift is made in contemplation of death it is in the nature of a testamentary disposition and subject to the estate tax.

It is settled that if anything essential to the full enjoyment of a gift or trust could not accrue to the donee until after
231 the death of the donor, such a gift is testamentary in character. If it is testamentary in character, it is subject to the tax. In United States v. Wells, 283 U. S. 102, text 116, the Court said:

"The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. *The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax.* Nichols v. Coolidge, 274 U. S. 531, 542; Milliken v. United States, ante, p. 15. As the transfer may otherwise have all the indicia of a valid gift inter vivos, the differentiating factor must be found in the transferor's motive.

Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition." [Italics added.]

It seems that the only question in this case, in view of the finding of facts by the lower Court and their support by substantial evidence, are: (1) Whether or not the dominant purpose of Mr. Spalding in reliquishing the power to amend, alter, or revoke the terms of the trust agreement was to avoid estate taxes; and (2) If a desire to avoid estate taxes was the dominant motive of Mr. Spalding, would that necessitate the holding that the relinquishment was in the nature of a testamentary disposition and, therefore, in contemplation of death?

Mr. Spalding was a man in exceptionally good health for one of his age. The original gifts were not made in 1925 and in 1934 in contemplation of death, nor with the idea of avoiding inheritance taxes. They were spendthrift trusts, made for the benefit of the children of the donor who had been unsuccessful in the management of their own business. He had previously made gifts, from time to time, to his wife and children, and at the time the trusts were created outright gifts were also made to his wife and another son. However, he did not believe it to be for the best interest of the son Jack and the daughter Suzanne that they be then given the management of the properties which he proposed to transfer to them.

The numerous activities in which the decedent was engaged, his varied interests in civic and charitable enterprises, his view that the Government was right in attempting to prevent, by taxation, the perpetuation of inordinately large fortunes from generation to generation, and numerous other circumstances, all sustain the finding of the lower Court that the original gifts in 1925 and in 1934 were not testamentary dispositions, nor made in contemplation of death, nor with the idea of avoidance of death taxes.

There is also ample evidence to support the finding of the
232 lower Court that Mr. Spalding did not make the relinquishment in the contemplation that death was near at hand. But the motive in 1937 that actuated the decedent in making the relinquishment of the power to alter or amend the trust, the effect of that motive, and the meaning of the language used in the reservation of power to amend are the features around which a solution of this case devolves:

Mr. Spalding irrevocably transferred the securties to the trustee for his children. No right to amend, alter, or revoke that transfer, or conveyance, was reserved, as was the situation in Hel-

vering v. City Bank, 296 U. S. 85.[3] The tax is upon the transfer of the property owned or controlled at death, but this property was transferred irrevocably many years before his death. The right of the enjoyment of the ownership in the corpus of each trust was not reserved to donor or subject to change or revocation in any way whatsoever. The instruments themselves, as well as the facts and circumstances, show that it was the intent and purpose of the trustor to completely pass the ownership of the corpora from himself to the trustee of his children. He had made a complete gift of the stock. What he reserved was the right to "amend, change, enlarge, or limit the terms" of the trust agreement upon the unanimous consent of the beneficiary, the trustee, and the settlor. The transfer of the stock was complete when made and there was nothing akin to a testamentary disposition in its transfer. The tax is upon the transfer of property, and the property transferred here was in no wise subject to alteration or amendment as to the corpus of either trust.

In the brief for the Government there is this forthright statement:

"* * * the decedent had created the trusts aforesaid, with spendthrift provisions, in order to meet the pressing necessities of his daugther and son Jack and to protect them against their own business misadventures and not to retain any benefit, directly or indirectly in himself, his intentions and purposes being to make the gifts absolute and complete."

Since the gifts of the securities were absolute and could not be revoked, it would seem that the donor's status with respect to the trusts after their creation was somewhat that of a co-administrator with powers retained in the trusts that could be exercised only in behalf of the estates, and whose acts were only as a representative of the estates, from which no benefit, directly or indirectly, could flow to the donor.

233

The brief for the Government also contains the further admission:

"It is well settled that the purpose of the statute is to prevent the evasion of the estate tax by devices, * * * commonly referred to as substitutes for testamentary dispositions, motivated by death purposes; * * *"

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[3] In Helvering vs. City Bank, 296 U. S. 85, the statement of facts show that:

"The trust was irrevocable save that the settlor reserved the right to modify, alter or revoke it, in whole or in part, or to change any beneficial interest; * * *"

Under the facts there the Court stated (text, 91):

"It is competent for Congress, in order to avoid the evasion of tax, to declare that when one has placed his property in trust *subject to a right of revocation* in himself and another who is not the beneficiary he shall, nevertheless, be deemed to control the property in such sense that the income therefrom shall be treated as his income for the levying of a tax." [Italics added.]

(In the instant case, however, there is no power to revoke the transfer of the stock or for the donor to recapture either the title or the enjoyment thereof.)

but in view of the fact that the gifts of the securities in 1925 and in 1934 were absolute and irrevocable, and that no property right was relinquished in 1937 or transferred upon Mr. Spalding's death in December 1938, there seems to be no actual or factual basis for the contention that the relinquishment in question was a substitute for a testamentary disposition. The right surrendered added nothing to the title of the trustee and transferred nothing out of the decedent's estate.

When, however, the settlor became appraised of the fact that the retention of the right to amend the terms by which a trust would be managed, or by which the income from the property might be enjoyed, might result in encumbering or burdening the cestui que trustent or the corpora by rendering them liable to a tax (as in the case of the retention of the right to revoke the enjoyment of a transfer), and that his gifts had not been as complete as he had intended, he set about promptly to free the property from the encumbrance or burden of a tax liability. That is no death purpose.

Appellant says, though, that if the relinquishor has the purpose of avoiding taxes at death, he has death on his mind, and such relinquishment is a testamentary disposition. The argument ignores the fact that a man has a right to take any lawful steps, or to make a relinquishment of such a power, in order to save taxes.* The only consequence from the relinquishment of such a power is that if it is relinquished at a time that the relinquishor deems death to be near at hand it will be held to have been a testamentary disposition. For if the donor makes a gift but retains the use or enjoyment, or the right to the use and enjoyment, until his death, the Collector could rightly inquire of such donor. "Wouldst thou both eat thy cake and have it?" A gift in life with the right of revocation, or the right of enjoyment, reserved in the donor is not such a transfer as will take the corpus of the
234 gift out of donor's estate for estate tax purposes at death.

But an irrevocable, or absolute, gift not made in contemplation of death, is not taxable despite the fact that incidental benefit in the avoidance of estate taxes will result on the death of the donor. Every gift has that incidence.

Moreover, in view of the right and privilege of the taxpayer, often declared by the Courts and long recognized by the Congress,

* In the case of Gregory v. Helvering, 293 U. S. 465, it was said:
"The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. United States v. Isham, 17 Wall. 496, 506; Superior Oil Co. v. Mississippi, 280 U. S. 390, 395–6; Jones v. Helvering, 63 App. D. C. 204, 71 F. (2d) 214, 217."

to decrease the amount of his taxes or to avoid them, altogether by means which the law permits, the mere making of a gift more complete by freeing it from estate taxes that otherwise would accrue upon the donor's death will not be construed as the equivalent of a testamentary disposition in the absence of proof that the relinquishor considered that death was near at hand.

The Appellant would have us: (1) To presume that Mr. Spalding's motive in making the relinquishment was solely or dominantly for the purpose of avoiding estate taxes. (2) Having accepted the first presumption, he would have us then presume that the relinquishment was a testamentary disposition. (3) Then, after accepting presumptions (1) and (2), he would have us lastly presume that the relinquishment was in contemplation of death.

It is only by the pyramiding of these several presumptions that the conclusion which the Collector seeks can be reached. Pyramiding of presumptions is not permissible under the holding of this Court in Standard Accident Ins. Co. v. Nicholas, 146 F. (2d) 376.

The judgment is affirmed.

In United States Circuit Court of Appeals

No. 11160

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE

*v.*

TRUST COMPANY OF GEORGIA, AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED

*Judgment*

May 3, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

235 [Clerk's certificate to foregoing transcript omitted in printing.]

*Order allowing certiorari.*

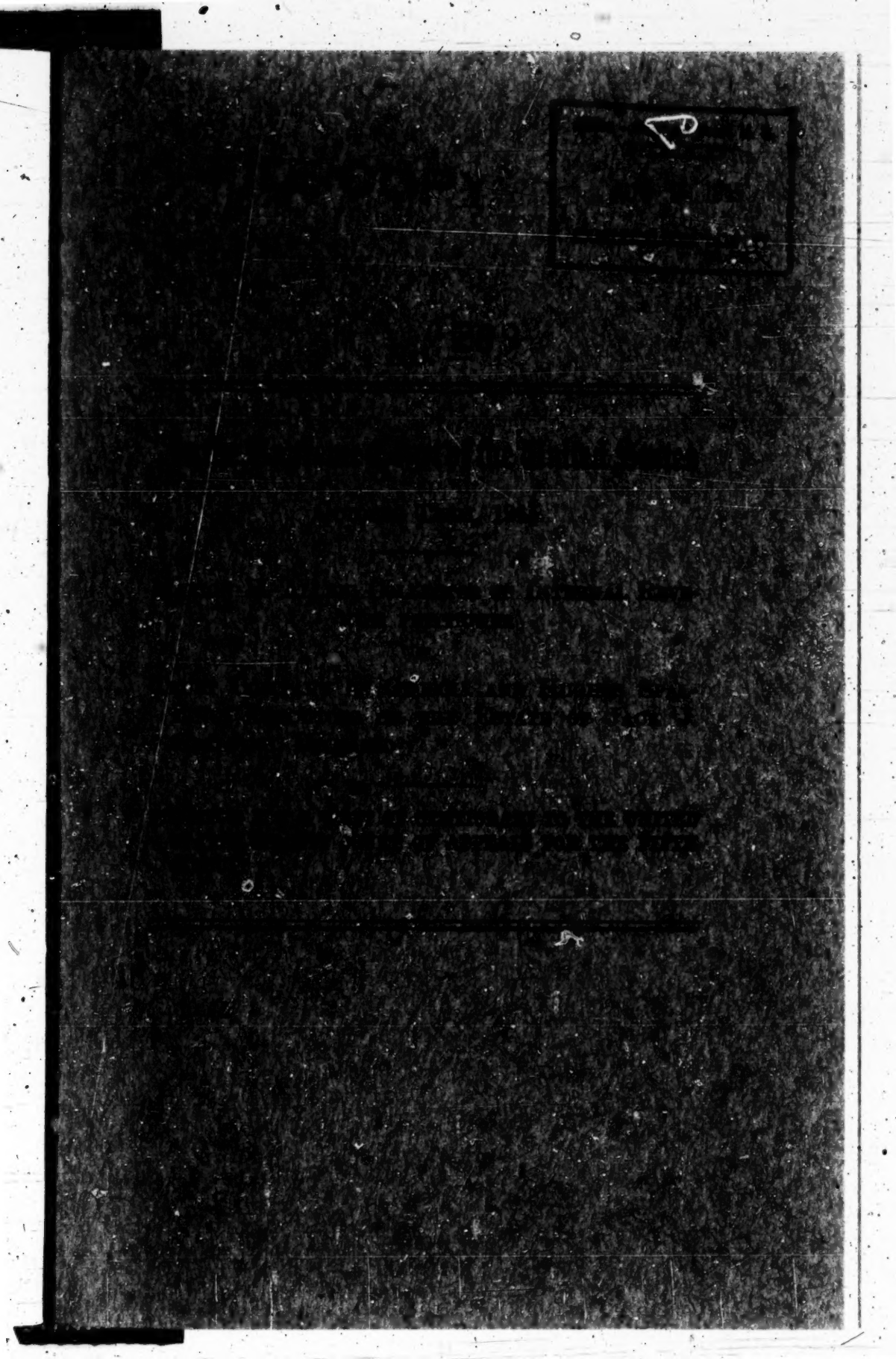
Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON and Mr. Justice BURTON took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1945



# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute and regulations involved | 2 |
| Statement | 2 |
| Specification of errors to be urged | 5 |
| Reasons for granting the writ | 5 |
| Conclusion | 15 |
| Appendix | 16 |


## CITATIONS


| Cases: | |
|---|---|
| *Anneke* v. *Willcuts*, 1 F. Supp. 662 | 9 |
| *Brown* v. *Routzahn*, 58 F. 2d 329, reversed, 63 F. 2d 911, certiorari denied, 290 U. S. 641 | 9 |
| *Central Hanover Bank Co.* v. *Kelly*, 319 U. S. 94 | 11 |
| *City Bank Farmers Trust Co.* v. *McGowan*, 323 U. S. 594 | 12, 13 |
| *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, 137 F. 2d 653, rehearing denied September 20, 1943, affirming 50 F. Supp. 949, certiorari denied, 321 U. S. 764 | 7, 9, 12, 13 |
| *Denniston* v. *Commissioner*, 106 F. 2d 925 | 9 |
| *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916, certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582 | 7, 12, 14 |
| *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794, certiorari denied, 306 U. S. 648, rehearing denied 308 U. S. 634 | 7, 12, 14 |
| *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940, certiorari denied, 320 U. S. 744 | 6, 7, 14 |
| *Helvering* v. *City Bank Co.*, 296 U. S. 85 | 3, 10 |
| *Hofheimer, Estate of* v. *Commissioner*, decided May 25, 1945 | 8, 11, 13 |
| *Kroger's Estate, In re*, 145 F. 2d 901, certiorari denied April 2, 1945 | 12 |
| *Mather* v. *MacLaughlin*, 57 F. 2d 223 | 9 |
| *McCaughn* v. *Real Estate Co.*, 297 U. S. 606 | 12, 14 |
| *Northern Trust Co.* v. *Commissioner*, 116 F. 2d 96 | 7, 12 |
| *Pate* v. *Commissioner*, decided June 19, 1945 | 12 |
| *Slifka* v. *Johnson*, decided May 22, 1945 | 9 |
| *Turner* v. *Hassett*, 37 F. Supp. 996 | 9 |
| *Updike* v. *Commissioner*, 88 F. 2d 807 | 12 |




660280—45——1

| Cases—Continued. | Page |
|---|---|
| *United States* v. *Tonkin*, decided July 3, 1945 | 12 |
| *United States* v. *Wells*, 283 U. S. 102 | 7, 12 |
| *Whitney* v. *Tax Commission*, 309 U. S. 530 | 11 |
| *Wickwire* v. *Reinecke*, 275 U. S. 101 | 13, 14 |
| **Statutes:** | |
| Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 302 | 10 |
| Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302 [as amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680] | 6, 9, 10, 16 |
| Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 805 | 11 |
| **Miscellaneous:** | |
| I Paul, Federal Estate and Gift Taxation (1942), Sec. 6.07 | 8 |
| Treasury Regulations 80: | |
| Art. 16, as amended by T. D. 4966 1940-1 Cum. Bull. 220 | 8 |
| Art. 21 | 17 |

# In the Supreme Court of the United States

OCTOBER TERM, 1945

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NO. —

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

*v.*

TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT**

The Acting Solicitor General, on behalf of Marion H. Allen, Collector of Internal Revenue for the District of Georgia, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered May 3, 1945, affirming the decision of the District Court of the United States for the Middle District of Georgia.

**OPINIONS BELOW**

The opinion of the District Court (R. 198–213) is reported in 55 F. Supp. 269. The opinion of the Circuit Court of Appeals (R. 225–234) is reported in 149 F. 2d 120.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 3, 1945 (R. 234). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of ~~1925~~ February 13, 1925.

## QUESTION PRESENTED

Whether a relinquishment of a power to amend each of two trusts for the sole purpose of preventing the inclusion of their corpora in the decedent's gross estate, in order to avoid the payment of the additional estate tax resulting from such inclusion, was made by the decedent in contemplation of his death within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended.

## STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set out in the Appendix, *infra*, pp. 16–19.

## STATEMENT

So far as material here, the facts found by the District Court (R. 213–218), and restated by the court below in its opinion (R. 225–229), may be summarized as follows:

The decedent, Jack J. Spalding, a resident of Fulton County, Georgia, died December 8, 1938, at the age of 82. (R. 213.)

In 1925, the decedent, in order to relieve the financial distress of his daughter, Suzanne (Mrs. Schroeder), and of one of his sons, Jack, made a transfer of securities in separate trusts of the value of $50,000 for each. In 1934, he added securities to each trust of the value of $50,000. (R. 226.)

The trusts were of the type usually referred to as "spendthrift" trusts and were irrevocable, except that the decedent, in both the original 1925 trust agreements and in the 1934 additions thereto, reserved a power to amend as follows (R. 227):

> During my life, by the unanimous consent of the said trustee, my said daughter [son] and of myself, the terms of this agreement may be amended, changed, enlarged or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked.

At the time the decedent believed the state of the federal law to be such that the reservation of such power would not require the inclusion in his gross estate at his death of the value of the corpora of the trusts. (R. 136.) But when the decision of this Court in *Helvering* v. *City Bank Co.*, 296 U. S. 85, holding otherwise, was called to his attention in May, 1937, by another son, Hughes, who was a member of the decedent's law firm, the decedent forthwith relinquished the power. (R. 227.)

The findings of the District Court that the decedent had prepared and executed an instrument renouncing the power reserved in the trusts upon being advised that the gifts remained a part of his estate for estate tax purposes (Finding 10, R. 217), and that his purpose in relinquishing it when he did was "so that they [the trusts] would not be a part of his estate for estate tax purposes" (Finding 12, R. 218), were accepted by the Circuit Court of Appeals as supported by the evidence (R. 229). As the Circuit Court of Appeals stated, the District Court had concluded from such findings that an intent to avoid an estate tax, standing alone, was not conclusive that a gift or a release of a power was made in contemplation of death. (R. 229.)

The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that, in its opinion, the relinquishment of such a power will be held to have been a testamentary disposition only if the decedent "deems death to be near at hand" (R. 233), and that (R. 234):

> * * * in view of the right and privilege of the taxpayer, often declared by the Courts and long recognized by the Congress, to decrease the amount of his taxes or to avoid them altogether by means which the law permits, the mere making of a gift more complete by freeing it from estate taxes that otherwise would accrue upon the donor's death will not be construed as the

equivalent of a testamentary disposition in the absence of proof that the relinquishor considered that death was near at hand.

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that a relinquishment of a power to amend, change, enlarge or limit a trust, reserved therein by the decedent, was not made by him in contemplation of his death within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended, even though in making it the decedent was motivated solely by a purpose to prevent the inclusion of its corpus in his gross estate at his death in order to avoid the additional estate tax resulting from such inclusion.

(2) In holding that a relinquishment so motivated was not made in contemplation of his death unless the decedent deemed death to be near at hand.

(3) In failing to hold that the respondents had not sustained the burden of proof resting upon them to show that the relinquishment in question was not made in such contemplation.

(4) In affirming the judgment of the District Court.

## REASONS FOR GRANTING THE WRIT

1. The relinquishment of the power to alter and amend each trust, reserved to the decedent and the beneficiary, brings the transfer squarely

within Section 302 (d) of the Revenue Act of 1926 as amended by Section 401 of the Revenue Act of 1934 (Appendix, *infra*), if the relinquishment of any such power was made in contemplation of death. This is precisely the type of case which the statute was designed to cover. The Circuit Court of Appeals held, however, that a relinquishment of a power to amend a trust made by the decedent solely for the purpose of preventing the inclusion of its corpus in his gross estate at his death for federal estate tax purposes was not made in contemplation of death as a matter of law.[1] This holding is in conflict with the

[1] The court below accepted the District Court's finding that the release was made so that the trusts would not be a part of the decedent's estate for estate tax purposes. (Finding 12, R. 218.) While the court below also accepted the District Court's finding that the decedent was motivated *in making the gifts* by his desire to meet the necessities of his children and set aside property for them free of all claims for taxes or otherwise and that "the release of the power on May 1, 1937 falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934" (Finding 13, R. 218), this is just another way of saying that when the decedent made the transfers for the purposes stated, he wanted them to be free of tax claims and assumed that they were. The dominant motive for the transfers themselves was not a purpose to avoid the tax (R. 156), whereas the relinquishment of the reserved power was induced solely by that motive. (R. 218.) The only purpose to be served by the relinquishment that was not already accomplished by the original transfers was escape from death taxes.

A similar situation prevailed in *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied, 320 U. S. 744, where the Second Circuit affirmed a judgment of the district court entered on the verdict of a

prevailing decisions of the Circuit Courts of Appeals for the Second and Third Circuits, grounded on the principle that the decision of this Court in *United States* v. *Wells*, 283 U. S. 102, requires the inclusion in the gross estate of transfers made for the purpose of avoiding the estate tax, since this is a purpose that can be effective only at death. *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916 (C. C. A. 2d), certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582; *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied, 320 U. S. 744; *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, 137 F. 2d 653 (C. C. A. 3d), rehearing denied September 20, 1943, affirming *per curiam* a decision of the District Court for the Western District of Pennsylvania, reported in 50 F. Supp. 949, "for the reasons sufficiently and satisfactorily given in the opinion of" the District Court, certiorari denied, 321 U. S. 764. See also *Northern Trust Co.* v.

jury which it had directed in the Government's favor. In that case the decedent had also assumed that the transfer he had made was free from the estate tax, but when advised by an attorney to the contrary he revoked the trust and made a new transfer, on the attorney's advice, which had no life purpose, and would have accomplished nothing not previously effected by the first transfer, except avoidance of the tax. The second transfer was held to have been made in contemplation of death as a matter of law.

*Commissioner*, 116 F. 2d 96 (C. C. A. 7th), and *Estate of Hofheimer* v. *Commissioner*, decided May 25, 1945, by the Circuit Court of Appeals for the Second Circuit (C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10,206), where it was assumed that a release of a reserved power made to avoid the tax would come within the statute, but the Tax Court's decision was reversed for lack of substantial evidence to support its finding that that was the motive. The applicable Treasury Regulations also so provide. Article 16 of Treasury Regulations 80 (1937 ed.), as amended by T. D. 4966, 1940–1 Cum. Bull. 220.[2] See also I Paul, Federal Estate and Gift Taxation (1942), Section 6.07 (p. 257).

There is now no accepted authority to the contrary, and the decisions of a number of District Courts of the United States are in accord. See

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[2] As so amended, this Article reads, so far as material here, as follows:

"The phrase 'contemplation of death,' as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition."

*Anneke* v. *Willcuts*, 4 F. Supp. 662 (Minn.); *Mather* v. *MacLaughlin*, 57 F. 2d 223 (E. D. Pa.); *Brown* v. *Routzahn*, 58 F. 2d 329 (N. D. Ohio), reversed on other grounds, 63 F. 2d 914 (C. C. A. 6th), certiorari denied, 290 U. S. 641; *Turner* v. *Hassett*, 37 F. Supp. 996, 998 (Mass.); *Slifka* v. *Johnson* (S. D. N. Y.), decided May 22, 1945 (C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10,205). In this connection it is to be observed that the contrary decision in the case of *Denniston* v. *Commissioner*, 106 F. 2d 925 (C. C. A. 3d), upon the authority of which the decision of the District Court was made to rest but which the Circuit Court of Appeals did not mention, was in effect overruled by the Third Circuit in its *per curiam* affirmance of the District Court's decision in *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, *supra*,

2. In reaching their decision both courts below applied, as controlling, a legal criterion which contained a dual misconception. The court below, following the reasoning of the District Court, held that a transfer in contemplation of death within the meaning of Section 302 (d) must be a transfer "out of the decedent's estate" or else the grantor must "deem death to be near at hand" (R. 233; see also the opinion of the District Court, R. 200).[3]

[3] The District Court said (R. 200):

"* * * The statute is just a rule by which to separate property which in substance is a part of an estate from that which is not. Under that rule, if a gift in form is in reality

The holding that a relinquishment of a reserved power for the purpose of avoiding the estate tax is not a relinquishment in contemplation of death within the meaning of Section 302 (d), for the reason that the relinquishment did not involve a transfer "out of the decedent's estate" and hence was not a substitute for a testamentary disposition, is inconsistent with the holding of this Court in *Helvering* v. *City Bank Co.*, 296 U. S. 85. In that case this Court held that under similar provisions of Section 302 (d) of the Revenue Act of 1924, c. 234, 43 Stat. 253,[4] a transfer sub-

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a part of an estate, it so remains, notwithstanding the transfer. It is not the transfer which makes the property estate property but it must be estate property in substance before the transfer can be disregarded. The property is classified as estate property or not according to the fact existing at the time of transfer and not by any desire to avoid taxes. The ultimate fact which results in retaining a complete gift in the estate is a special concern about approaching death. A desire to avoid taxes has no legal effect and it has no probative value even as evidence of special concern about death, * * *."

[4] The first sentence of Section 302 (d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Section 302 (d) (1) of the Revenue Act of 1926 as amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (Appendix, *infra*), are substantially identical with Section 302 (d) of the Revenue Act of 1924, except that the phrase "adequate and full consideration in money or money's worth" is substituted for the phrase "fair consideration in money and money's worth" appearing in the earlier statute. A second sentence was added in Section 302 (d) of the Revenue Act of 1926, dealing with relinquishments made within two years of death, which, with the addition of the phrase "unless shown to the contrary" (designed to eliminate the conclusive character of the presumption), became Section 302 (d) (3) of the Revenue

ject to such a power as is here involved at the time of death came within the statute. The Court further held that the statute was constitutional as applied to transfers made after the date of the enactment of the statute, on the ground that, while the transfer was complete when made, Congress could, for the purpose of preventing evasion of taxes, provide that such a transaction should be deemed testamentary in character. See also *Central Hanover Bank* v. *Kelly*, 319 U. S. 94, 97–98, and *Whitney* v. *Tax Commission*, 309 U. S. 530. It is thus recognized that the transaction is in fact an *inter vivos* transfer, involving no transfer "out of the estate" at death. The provision that a relinquishment of a reserved power in contemplation of death shall bring the transfer within the statute is but a corollary of the provision that the transfer shall be reached if the power is terminated by death. Cf. *Estate of Hofheimer* v. *Commissioner, supra.*

The second branch of the legal criterion adopted by the courts below—that in the absence of a transfer out of the estate the transfer is in con-

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Act of 1926 as amended by Section 401 of the Revenue Act of 1934 (Appendix, *infra*). Section 401 of the Revenue Act of 1934 made no other changes in Section 302 (d) of the Revenue Act of 1926, except those made by the addition of Section 302 (d) (2) (Appendix, *infra*), which have no relevancy here. Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, made amendments to Section 302 (d) (1) of the Revenue Act of 1926, as amended, but under express provisions of Section 805 (b) they do not affect this case and in any event are not material here.

templation of death only where the grantor deems death to be near at hand—is inconsistent with the holding of this Court in *United States* v. *Wells, supra,* and in *McCaughn* v. *Real Estate Co.,* 297 U. S. 606, and *City Bank Farmers Trust Co.* v. *McGowan,* 323 U. S. 594, which make it plain that the statute is satisfied where the motivating factor in the transfer is the concern of the decedent about the devolution of his property at or after death, irrespective of an apprehension of death. The decision below is also in conflict in this regard with the decisions of the Second Circuit in *Farmers' Loan & Trust Co.* v. *Bowers, supra* (68 F. 2d 916); *Farmers' Loan & Trust Co.* v. *Bowers, supra* (98 F. 2d 794), and *First Trust & Deposit Co.* v. *Shaughnessy, supra;* with the decisions of the Third Circuit in *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra,* and *United States* v. *Tonkin,* decided July 3, 1945, not yet reported; with the decision of the Seventh Circuit in *Northern Trust Co.* v. *Commissioner, supra;* with the decisions of the Eighth Circuit in *Updike* v. *Commissioner,* 88 F. 2d 807, and *Pate* v. *Commissioner,* decided June 19, 1945, not yet reported, and with the decision of the Sixth Circuit in *In re Kroger's Estate,* 145 F. 2d 901, certiorari denied April 2, 1945, No. 998, 1944 Term.

4. The decision of the court below disregards established principles as to the burden of proof.

It is our view that since the District Court found that the motive for the relinquishment of the power was the avoidance of the tax, both it and the court below were compelled to hold that the relinquishment of the power was made in contemplation of death within the meaning of Section 302 (d) (1) of the Revenue Act of 1926 as amended.

But even if we are wrong about this, nevertheless the decisions should have been against the respondents, because they have manifestly failed to sustain the burden of proof resting upon them in this suit for refund to show that the relinquishment was not made in contemplation of death.

The Commissioner determined that the decedent made it in contemplation of his death. That determination cast the burden of proof upon the respondents to show otherwise. *Wickwire* v. *Reinecke*, 275 U. S. 101; *City Bank Farmers Trust Co.* v. *McGowan*, *supra*; *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, *supra*. *Cf. Estate of Hofheimer* v. *Commissioner*, *supra*. This means that the respondents were required to show by a preponderance of the evidence that the decedent was actuated by a life purpose in relinquishing the power. This they not only did not do, but to the contrary established that, except for the fact that he desired to prevent the inclusion in his gross estate of the corpora of the trusts and thus to avoid the death tax, he would not have relinquished

the power. Proof of such purpose manifestly does not satisfy the burden of proof. *First Trust & Deposit Co.* v. *Shaughnessy, supra.* Otherwise stated, the governing principle is that, if the respondents fail to show that the motive which induced the transfer (relinquishment) was not a death motive, they failed to sustain the burden. *McCaughn* v. *Real Estate Co., supra.*

In this case, moreover, the relinquishment of the power occurred within two years of death, so that under Section 302 (d) (3) the presumption arises that the relinquishment was made in contemplation of death, and there is no proof here that it was not so made. *Wickwire* v. *Reinecke, supra; Farmers' Loan & Trust Co.* v. *Bowers, supra* (first case); *Farmers' Loan & Trust Co.* v. *Bowers, supra* (second case). Cf. *First Trust & Deposit Co.* v. *Shaughnessy, supra,* and *Estate of Hofheimer* v. *Commissioner, supra.*

5. The questions presented in this case are deemed to be of such importance as to justify review by this Court. Unless reviewed, the decision is likely to have an unsettling effect in an important field of taxation. The case, it is submitted, calls for a reaffirmation by this Court of the governing principle that a transfer, or a relinquishment of a reserved power to amend a trust, is made in contemplation of death where made for the purpose of avoiding the estate tax, and that neither an apprehension that death is near at hand

nor a transfer out of the estate at death is a requisite for inclusion of transferred property in the gross estate under Section 320 (d).

## CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted.

HAROLD JUDSON,
*Acting Solicitor General.*

AUGUST 1945.

## APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Sec. 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

(2) For the purposes of this subdivision the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests

which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

(3) The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

* * * * *

Treasury Regulations 80 (1937 ed.):

ART. 21. *Power relinquished in contemplation of death.*—If the decedent had previously held, either alone or in conjunction with another person or persons, a power to alter or amend, or revoke, or terminate a transfer made by him, and the power was subsequently relinquished in contemplation of the decedent's death (the relinquishment not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), then to the extent that the transferred property or any interest therein had been subject to such relinquished power it is to be included in the

gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the power was reserved at the time of the transfer and was relinquished and the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4.01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the power was reserved at the time of the transfer and its relinquishment and the decedent's death subsequently occurred, and the power was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest;

(3) When the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936) and the relinquishment of the power and the decedent's death subsequently occurred, and the power

was either reserved at the time of the transfer or later created or conferred, without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

Within the meaning of this article, it is essential to a relinquishment of a power which is exercisable by the decedent in conjunction with another person or persons that the relinquishment by such other person or persons operates as a complete relinquishment of the power.

If the relinquishment be not admitted or shown to have been in contemplation of decedent's death, but occurred within two years prior to such death, and affected the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value in excess of $5,000 (as of the date of decedent's death, or as of the applicable date under such an election as is referred to in the second paragraph of article 15) then, to the extent of such excess, the relinquishment will be deemed, unless shown to the contrary, to have been in contemplation of decedent's death. (See article 15.)

U. S. GOVERNMENT PRINTING OFFICE: 1948

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute and Regulations involved | 2 |
| Statement | 2 |
| Specification of errors to be urged | 5 |
| Summary of argument | 6 |
| Argument: | |
| The relinquishment of the power to amend the trusts for the purpose of avoiding the estate tax with respect thereto, was made by the decedent "in contemplation of his death" within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended | 8 |
| Conclusion | 29 |
| Appendix | 30 |


## CITATIONS


| Cases: | |
|---|---|
| *Anneke* v. *Willcuts*, 1 F. Supp. 662 | 17, 19 |
| *Beeler* v. *Motter*, 33 F. 2d 788 | 23 |
| *Boole, Estate of*, 98 Cal. App. 714 | 17 |
| *Brown* v. *Routzahn*, 58 F. 2d 329, reversed, 63 F. 2d 914, certiorari denied, 290 U. S. 641 | 19 |
| *Burnet* v. *Guggenheim*, 288 U. S. 280 | 21 |
| *Burton, Exr.*, v. *Tax Commission*, 37 Ohio App. 183 | 24 |
| *Central Hanover Bank Co.* v. *Kelly*, 319 U. S. 94 | 21 |
| *Chambers* v. *Larronde*, 196 Cal. 100 | 15 |
| *City Bank Co.* v. *McGowan*, 323 U. S. 594 | 16, 21, 22, 25, 27 |
| *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733 | 18 |
| *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, 137 F. 2d 653, affirming 50 F. Supp. 949, certiorari denied, 321 U. S. 764 | 17, 19, 22, 28 |
| *Denniston* v. *Commissioner*, 38 B. T. A. 1076, reversed, 106 F. 2d 925 | 17, 19 |
| *Dommerich* v. *Kelly*, 132 N. J. Eq. 220 | 17, 28 |
| *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916, certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582 | 14, 16, 17 |
| *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794, certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634 | 16, 17 |
| *Fernandez* v. *Weiner*, decided December 10, 1945 | 21 |
| *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 949, certiorari denied, 320 U. S. 744 | 10, 16, 22 |

Cases—Continued


| | Page |
|---|---|
| *Flannery* v. *Willcuts*, 25 F. 2d 951 | 23 |
| *Gaither* v. *Miles*, 268 Fed. 692 | 23 |
| *Harnischfeger* v. *Commissioner*, 31 B. T. A. 224 | 27 |
| *Harnischfeger, Will of*, 208 Wis. 317 | 27 |
| *Hartford, In re*, 122 N. J. Eq. 489, affirmed, *sub nom. Hartford* v. *Martin*, 120 N. J. L. 564, affirmed, 122 N. J. L. 283 | 17 |
| *Helvering* v. *City Bank Co.*, 296 U. S. 85 | 4, 10, 21, 25 |
| *Helvering* v. *Stock Yards Co.*, 318 U. S. 693 | 17 |
| *Hofheimer, Estate of* v. *Commissioner*, 2 T. C. 773, reversed, 149 F. 2d 733 | 19 |
| *Kaufman* v. *Reinecke*, 68 F. 2d 642 | 25 |
| *Kroger's Estate, In re*, 145 F. 2d 901, certiorari denied, 324 U. S. 866 | 22, 24, 27 |
| *Lippincott* v. *Commissioner*, 72 F. 2d 788 | 24 |
| *Mather* v. *McLaughlin*, 57 F. 2d 223 | 19 |
| *McCaughn* v. *Real Estate Co.*, 297 U. S. 606 | 21, 22, 25, 27 |
| *Milliken* v. *United States*, 283 U. S. 14 | 12 |
| *Nicholas* v. *Martin*, 128 N. J. Eq. 344 | 25, 27 |
| *Nichols* v. *Coolidge*, 274 U. S. 531 | 12 |
| *Northern Trust Co.* v. *Commissioner*, 116 F. 2d 96 | 17 |
| *Pate* v. *Commissioner*, 149 F. 2d 669 | 22, 24, 27 |
| *Pauson, Estate of*, 186 Cal. 358 | 15 |
| *Porter* v. *Commissioner*, 288 U. S. 436 | 21 |
| *Rea* v. *Heiner*, 6 F. 2d 389 | 23 |
| *Reynolds, Estate of*, 169 Cal. 600 | 15 |
| *Sanford, Estate of* v. *Commissioner*, 308 U. S. 39 | 21 |
| *Scheider* v. *Martin*, 127 N. J. Eq. 323, affirmed, 124 N. J. L. 567 | 27 |
| *Schweinler* v. *Thayer-Martin*, 117 N. J. Eq. 67, affirmed, 13 N. J. Misc. 722 | 27 |
| *Sellinger's Adm'r* v. *Reeves*, 292 Ky. 114 | 17 |
| *Shukert* v. *Allen*, 273 U. S. 545 | 13 |
| *Shwab* v. *Doyle*, 269 Fed. 321, reversed, 258 U. S. 529 | 23 |
| *Slifka* v. *Johnson*, decided May 22, 1945 | 19 |
| *Spreckels* v. *State of California*, 30 Cal. App. 363 | 23 |
| *Starck* v. *Commissioner*, 3 B. T. A. 514 | 23 |
| *Taft* v. *Commissioner*, 33 B. T. A. 671, affirmed, 92 F. 2d 667, affirmed, 304 U. S. 351 | 19 |
| *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851 | 17 |
| *Tax Commission* v. *Parker*, 117 Ohio St. 215, writs of error dismissed, 278 U. S. 566 | 23, 27 |
| *Taylor* v. *United States*, 3 How. 197 | 14 |
| *Turner* v. *Hassett*, 37 F. Supp. 996 | 19 |
| *Tyler* v. *United States*, 281 U. S. 497 | 21 |
| *United States* v. *Graf Distilling Co.*, 208 U. S. 198 | 14 |
| *United States* v. *Hodson*, 10 Wall. 395 | 14 |

| Cases—Continued | Page |
|---|---|
| *United States* v. *Jacobs*, 306 U. S. 363, motion to set aside judgment denied, 306 U. S. 620 | 21 |
| *United States* v. *Stowell*, 133 U. S. 1 | 14 |
| *United States* v. *Wells*, 283 U. S. 102 | 7, 12, 13, 14, 16, 22, 26, 27 |
| *Vanderlip, Estate of*, v. *Commissioner*, 3 T. C. 358 | 19 |
| *Vaughan* v. *Riordan*, 280 Fed. 742 | 23 |
| *Whitney* v. *Tax Commission*, 309 U. S. 530 | 21 |
| *Wimpfheimer* v. *Martin*, 127 N. J. Eq. 587 | 17 |
| **Statutes:** | |
| Revenue Act of 1924, c. 234, 43 Stat. 253: | |
| Sec. 302 | 9 |
| Revenue Act of 1926, c. 27, 44 Stat. 9: | |
| Sec. 302 | 9 |
| Sec. 302 [as amended by Sec. 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680] | 8, 9, 30 |
| Revenue Act of 1934, c. 277, 48 Stat. 680: | |
| Sec. 401 | 9 |
| Revenue Act of 1936, c. 690, 49 Stat. 1648: | |
| Sec. 805 | 9 |
| **Miscellaneous:** | |
| Atlas, *Gifts in Contemplation of Death*, 23 Tax Magazine 421 (May, 1945) | 27 |
| Eisenstein, *Are We Ready for Estate and Gift Tax Revision?*, 23 Tax Magazine 316 (April, 1945) | 27 |
| Harriss, *Gift Taxation in the United States*, 13 20 (1940) | 27 |
| Harriss, *Gifts in Contemplation of Death*, 19 Tax Magazine 216 | 27 |
| 1 Paul, Federal Estate and Gift Taxation (1942): | |
| Sec. 6.05, p. 251, fn. 4 | 17 |
| Sec. 6.07, p. 257 | 18 |
| Pavenstedt, *Taxation of Transfers in Contemplation of Death: A Proposal for Abolition*, 54 Yale L. J. 70 (December, 1944) | 27 |
| Report to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. II, Part 2, p. 111 (1933) | 27 |
| Treasury Regulations 80 (1937 ed.): | |
| Art. 16, as amended by T. D. 4966, 1940-1 Cum. Bull. 220 | 18 |
| Art. 21 | 31 |

# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 289

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

*v.*

TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK J. SPALDING, DECEASED

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the District Court (R. 112–124) is reported in 55 F. Supp. 269. The opinion of the Circuit Court of Appeals (R. 128–137) is reported in 149 F. 2d 120.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 3, 1945. (R. 137.) Petition for a writ of certiorari was filed on August 2,

1945, and was granted October 8, 1945 (R. 138). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether a relinquishment of a power to amend each of two trusts for the purpose of preventing the inclusion of their corpora in the decedent's gross estate, in order to avoid the payment of the additional estate tax resulting from such inclusion, was made by the decedent "in contemplation his death" within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended.

## STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Statute and regulations involved are set out in the Appendix, *infra*, pp. 30–33.

## STATEMENT

So far as material here, the facts found by the District Court (R. 121–124), and restated by the court below in its opinion (R. 128–130), may be summarized as follows:

The decedent, Jack J. Spalding, a resident of Fulton County, Georgia, died December 8, 1938, at the age of 82. (R. 121.)

In 1925, the decedent, in order to relieve the financial distress of his daughter, Suzanne (Mrs.

Schroeder), and of one of his sons, Jack, made a transfer of securities in separate trusts of the value of $50,000 for each. In 1934, he added securities to each trust of the value of $50,000. (R. 122.)

The trusts were of the type usually referred to as "spendthrift" trusts and were irrevocable, except that the decedent, in both the original 1925 trust agreements and in the 1934 additions thereto, reserved a power to amend as follows (R. 129):

> During my life, by the unanimous consent of the said trustee, my said daughter [son] and of myself, the terms of this agreement may be amended, changed, enlarged, or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked.

Otherwise, each trust and the amendment thereof, above referred to, provided that the income thereof should be paid to the daughter and son, as the case might be, for life, or to her or his children in the event that she or he undertook to alienate the income or otherwise dispose of it, and that upon the death of either the income was to be paid to her or his children and their descendants, *per stirpes*, until the youngest child became of age, at which time the entire fund should be turned over to such child or children and their descendants, *per stirpes*; provided that, if either she or he left no child surviving, she or he might

dispose of the fund by will, and, if she or he did not do so, then the fund should revert to the decedent or to his estate, passing to the parties taking the same in like manner as the residuum of his estate is shared.[1] (R. 28–29.)

At the time, the decedent believed the state of the federal law to be such that the reservation of such power would not require the inclusion in his gross estate at his death of the value of the corpora of the trusts. (R. 77.) But when the decision of this Court in *Helvering* v. *City Bank Co.*, 296 U. S. 85, holding otherwise, was called to his attention in May, 1937, by another son, Hughes, who was a member of the decedent's law firm, the decedent forthwith relinquished the power. (R. 129–130.)

The findings of the District Court that the decedent had prepared and executed an instrument renouncing the power reserved in the trusts upon being advised that the gifts remained a part of his estate for estate tax purposes (Finding 10, R. 123), and that his purpose in relinquishing it when he did was "so that they [the trusts] would not be a part of his estate for estate tax purposes" (Finding 12, R. 123–124), were accepted by the

[1] By the 1934 amendment of each trust, the right of reverter of the estate was eliminated, it being instead provided that in the event the daughter or son failed to dispose of the corpus of the trust by will, then the fund should go to her or his heirs and administrators, as provided by law. (R. 25, 32).

Circuit Court of Appeals as supported by the evidence (R. 132). As the Circuit Court of Appeals stated, the District Court had concluded from such findings that an intent to avoid an estate tax, standing alone, was not conclusive that a gift or a release of a power was made in contemplation of death. (R. 132.)

The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that, in its opinion, the relinquishment of such a power will be held to have been a testamentary disposition only if the decedent "deems death to be near at hand" (R. 136), and that (R. 136–137):

> * * * in view of the right and privilege of the taxpayer, often declared by the Courts and long recognized by the Congress, to decrease the amount of his taxes or to avoid them, altogether by means which the law permits, the mere making of a gift more complete by freeing it from estate taxes that otherwise would accrue upon the donor's death will not be construed as the equivalent of a testamentary disposition in the absence of proof that the relinquisher considered that death was near at hand.

**SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred—

(1) In holding that a relinquishment of a power to amend, change, enlarge or limit a trust, reserved therein by the decedent, was not made by

him in contemplation of his death within the meaning of Section 302 (d). (1) of the Revenue Act of 1926, as amended, even though in making it the decedent was motivated solely by a purpose to prevent the inclusion of its corpus in his gross estate at his death in order to avoid the additional estate tax resulting from such inclusion.

(2) In holding that a relinquishment so motivated was not made in contemplation of his death unless the decedent deemed death to be near at hand.

(3) In failing to hold that the respondents had not sustained the burden of proof resting upon them to show that the relinquishment in question was not made in such contemplation.

(4) In affirming the judgment of the District Court.

## SUMMARY OF ARGUMENT

1. The statute requires the inclusion in the gross estate of both a transfer in which the grantor has reserved a power to alter, amend, or revoke, and where he has relinquished such power in contemplation of his death. The transfers made by the decedent in 1925, and the agreements made by him in 1934 amending them, contain such a power. He relinquished the power in 1937 at the age of 81, but while in good health, not because he feared or expected death, but solely because, having discovered that the reserved power would cause the value of the corpora of the trusts to be included

in his gross estate for estate tax purposes at his death, he desired to prevent this and the resultant imposition of the additional estate tax upon his estate. A relinquishment so motivated falls *per se* within the ambit of the statute.

2. Since the statute requires the inclusion in the gross estate of the corpus of a trust which either contains a reserved power to amend, or where such a power has been relinquished in contemplation of death, the point made by the court below that the relinquishment is not a transfer and therefore not a substitute for a testamentary disposition is irrelevant, as is likewise the circumstance that a relinquishment does not involve a transfer "out of the decedent's estate." Congress has required the inclusion, and its power to do so is not in question. Even so, it is now well settled that both such reservation and relinquishment are substitutes for testamentary dispositions.

3. Nor is it necessary, as the court below held, that, in order to bring the transaction within the statute, the motivating factor for the relinquishment be the decedent's belief that death was near at hand. This involves a definition of "contemplation of death" which is clearly inconsistent with the holding of this Court in *United States v. Wells*, 283 U. S. 102, and other cases, which make it plain that the Congressional purpose was not to restrict the application of the statute to

situations where the decedent turned to a consideration of the final devolution of his property because he thought he was about to die. The statute is satisfied where, for any other reason, the decedent becomes concerned about what could happen to his property at his death and as a result takes action to control, or in some manner affect, its final devolution.

If more were needed to establish that Congress did not intend to use the phrase "made in contemplation of death" in the sense of "made in contemplation of dying," it lies in the fact that its application in the latter sense to a relinquishment of a reserved power to amend the trust would be meaningless. For it would be purposeless for a decedent to relinquish such a power solely because he expected the very event to happen which would automatically release it. Hence the vital question always is what the decedent's reasons were for making an *inter vivos* transfer at the time he did, or for releasing the power he had reserved with respect thereto.

## ARGUMENT

### THE RELINQUISHMENT OF THE POWER TO AMEND THE TRUSTS FOR THE PURPOSE OF AVOIDING THE ESTATE TAX WITH RESPECT THERETO, WAS MADE BY THE DECEDENT "IN CONTEMPLATION OF HIS DEATH" WITHIN THE MEANING OF SECTION 302 (d) (1) OF THE REVENUE ACT OF 1926, AS AMENDED

1. Section 302 (d) (1) of the Revenue Act of 1926, as amended (Appendix, *infra*), provides that the value of the gross estate of a decedent



shall be determined by including the value at the time of his death of all property, *inter alia*, to the extent of any interest therein of which he has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power by the decedent, either alone or in conjunction with any person, to alter, amend or revoke, or where he relinquished such power in contemplation of his death.[2]

Each of the transfers in trust which the decedent had made to his daughter and son in 1925,

[2] The first sentence of Section 302 (d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, and Section 302 (d) (1) of the Revenue Act of 1926, as amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (Appendix, *infra*), are substantially identical with Section 302 (d) of the Revenue Act of 1924, except that the phrase "adequate and full consideration in money or money's worth" is substituted for the phrase "fair consideration in money and money's worth" appearing in the earlier statute. A second sentence was added in Section 302 (d) of the Revenue Act of 1926, dealing with relinquishments made within two years of death, which, with the addition of the phrase "unless shown to the contrary" (designed to eliminate the conclusive character of the presumption), became Section 302 (d) (3) of the Revenue Act of 1926, as amended by Section 401 of the Revenue Act of 1934 (Appendix, *infra*). Section 401 of the Revenue Act of 1934 made no other changes in Section 302 (d) of the Revenue Act of 1926, except those made by the addition of Section 302 (d) (2) (Appendix, *infra*), which have no relevance here. Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, made amendments to Section 302 (d) (1) of the Revenue Act of 1926, as amended, but under express provisions of Section 805 (b) they do not affect this case and in any event are not material here.

and the agreements whereby he later, in 1934, made additions thereto, contained a reservation of such a power. (R. 129.) But, when in 1937, he ascertained that, under the decision of this Court in *Helvering* v. *City Bank Co.*, 296 U. S. 85, the reserved power would sweep the corpora of the trusts into his gross estate for estate tax purposes, he forthwith relinquished it in order to prevent such inclusion and the imposition upon his estate of the additional estate tax resulting therefrom. In these circumstances, the District Court found that the decedent's purpose in relinquishing the power when he did was "so that they [the trusts] would not be a part of his estate for estate tax purposes" (Finding 12, R. 123–124), such finding being accepted by the court below. (R. 132).[3]

[3] While the court below also accepted the District Court's finding that the decedent was motivated in making the transfers by his desire to meet the necessities of his children and set aside property for them free of all claims for taxes or otherwise, and that the release of the power on May 1, 1937, fell within the scope of the purpose and motive he had in making the transfers in 1925 and 1934 (Finding 13, R. 124), this is just another way of saying that, when the decedent made the transfers for the purposes stated, he wanted them to be free from tax claims and assumed that they were. Although the dominant motive for the transfers themselves may not have been a purpose to avoid the tax (R. 88), the relinquishment of the reserved power was induced by that motive (R. 123). Moreover, the only purpose to be subserved by the relinquishment that was not already accomplished by the original transfers was escape from the death taxes.

A similar situation prevailed in *First Trust & Deposit Co.* v. *Skaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied.

While the decedent was 81 years of age at the time he released the power, the Government does not claim that he was motivated in doing so by any fear or expectation of death induced by his age or by the condition of his mind or body. On the other hand, the record is devoid of any proof that he was actuated by any other motive in releasing it than to avoid the death tax. There is no basis in the evidence for a finding that he would have released it if he had not deemed it necessary or expedient to do so in order to avoid the tax.

The statute deals with transfers and also with relinquishments of powers which, if retained, would have rendered prior transfers taxable. With respect to both classes the imposition of the tax depends upon the existence of a contemplation of death motive. Accordingly the cases dealing with transfers in contemplation of death furnish persuasive precedents for determining whether or not a purpose to avoid the tax is a death motive.

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320 U. S. 744, where the Second Circuit affirmed a judgment of the District Court entered on the verdict of a jury which it had directed in the Government's favor. In that case, the decedent had also assumed that the transfer he had made was free from the estate tax; but, when advised by an attorney to the contrary, he revoked the trust and made a new transfer, on the attorney's advice, which had no life purpose and would have accomplished nothing not previously effected by the first transfer except avoidance of the tax. The second transfer was held to have been in contemplation of death as a matter of law.

The conclusion that a transfer so motivated falls within the statute is supported by *United States* v. *Wells*, 283 U. S. 102, requiring the inclusion in the gross estate of transfers which are motivated by a purpose that can become effective only at death. As explained by the Court (pp. 116–117), the very purpose of Congress in enacting the contemplation of death provision was to reach substitutes for testamentary dispositions in order to prevent the evasion of the tax. In support of this view, the Court cited *Nichols* v. *Coolidge*, 274 U. S. 531, 542, and *Milliken* v. *United States*, 283 U. S. 14, 15, where it had stated (p. 23):

> It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death.

Hence, in the *Wells* case, the Court said (p. 117):

> As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contem-

plated," that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition.

A purpose to avoid the tax is such a motive; at least, it is a motive which would cause a decedent to make an *inter vivos* transfer instead of a will, or instead of permitting his property to pass under the intestacy laws. If a transfer made to avoid the tax is within the statute, it follows, of course, that a relinquishment made for a similar motive is likewise within the reach of the tax.

There was, of course, no purpose to avoid the tax established in the *Wells* case, so that the decision of the Court in that case could only have been implicitly responsive to the Government's contention therein that a purpose to avoid the tax brought a transfer so motivated within the contemplation of death provision of the statute.[4]

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[4] In this connection, the Government said in its brief in that case, No. 252, October Term, 1939 (p. 18):

> Inasmuch as the character of the gift, for purposes of taxation is determined by the motive actuating it, evidence of an intent to avoid the tax is convincing evidence that the donor was concerned with the distribution of his property in anticipation of his death. On the other hand, the absence of such evidence can not overcome the statutory presumption.

It is to be noted, moreover, that as early as *Shukert* v. *Allen*, 273 U. S. 545, this Court, speaking through Mr. Justice Holmes, took occasion to point out that the transfers there under consideration were not made for the purpose of avoiding the tax. The decision of the Court might well have been different had it appeared that the transaction there was so motivated.

Any other construction of the statute would, however, obviously serve to defeat the indicated purpose of Congress and is, therefore, inadmissible. *Taylor* v. *United States*, 3 How. 197; *United States* v. *Stowell*, 133 U. S. 1; *United States* v. *Hodson*, 10 Wall. 395; *United States* v. *Graf Distilling Co.*, 208 U. S. 198; *Farmers' Loan & Trust Co.* v. *Bowers*, 68 F. 2d 916 (C. C. A. 2d), certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582. Thus, in the last cited case, the Second Circuit, in holding that a purpose to avoid the tax brought the transfers there under consideration within the statute, said (p. 923):

> Statutory provisions intended to prevent the evasion of the general purposes of the statute ought to be fairly and reasonably construed so as to carry out their purposes. * * * The rule is specifically applicable to statutes providing for the taxation of transfers in contemplation of death. *In re Fulham's Estate*, 96 Vt, 308, 119 A. 433.

We submit that, by hypothesis, a transfer so motivated falls within the ambit of the statute, for it is absurd to say that this is not the type of transfer which Congress was attempting to reach.

It is in this connection to be noted that in the *Wells* case (283 U. S., p. 114, fn. 9) the Court cited with evident approval certain decisions of the Supreme Court of California which gave the term "contemplation of death" a broader significatica than that accorded it by the lower court in

that case—namely, *Estate of Reynolds*, 169 Cal. 600; *Estate of Pauson*, 186 Cal. 358; *Chambers* v. *Larronde*; 196 Cal. 100. Thus, in the *Larronde* case, the California court held (p. 113) that "an undisclosed intent to secure to her children the entire, undiminished fruits of her life's work while, at the same time, attempting to avoid the imposition of an inheritance tax and the expenses of probate incident to a testamentary disposition of her property" would tend to support a finding that the transfers were made in contemplation of death. These cases involved an amendment to the California taxing statute specifically providing that the phrase was not restricted to the expectancy of death actuating gifts *causa mortis*, but extended to all transfers made in lieu of or to avoid the passing of property by testate or intestacy laws. In the *Reynolds* case, it was stated by way of dictum that the amendment did not change the meaning of the phrase, but in the *Larronde* case, where the transfers had occurred prior to the amendment, the court gave the term "contemplation of death" standing alone, as it did in the original statute, the same meaning as was given to it under the amendment.

Thus, while the California legislature undertook by the amendment specifically to deal with the decedent's purpose to prevent the passing of the property by testate or intestacy laws, it was not necessary for it to do so. Similarly, this

Court in the *Wells* case did not deem it necessary for Congress to have dealt specifically with the matter of motives, and, assuredly, it was not necessary for Congress to classify them, or expressly to say that a purpose to prevent the inclusion of property in the gross estate brought a transfer so motivated within the statute. Cf. *City Bank Co.* v. *McGowan*, 323 U. S. 594. It is sufficient that, as the Court said, the purpose of Congress was to sweep into the gross estate property transferred by substitutes for testamentary dispositions springing from a certain type of motives which may be denominated "death motives" as distinguished from "life motives."

In any case, there is, we submit, now no acceptable authority which has construed the *Wells* case as justifying a conclusion that a purpose to avoid the tax is not a "death motive," unless the decision of the court below is regarded as such. See, aside from *Farmers' Loan & Trust Co.* v. *Bowers*, already cited (68 F. 2d 916), *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *First Trust & Deposit Co.* v. *Shaughnessy*, 134 F. 2d 940 (C. C. A. 2d), certiorari denied, 320 U. S. 744;[5] *Commonwealth Trust Co. of*

[5] In this case, the Second Circuit approached the question from the standpoint of the burden of proof resting upon the taxpayer to show that the transfer was not made by the

*Pittsburgh* v. *Driscoll*, 137 F. 2d 653 (C. C. A. 3d), affirming *per curiam* a decision of the District Court for the Western District of Pennsylvania, reported in 50 F. Supp. 949, "for the reasons sufficiently and satisfactorily given in the opinion of" the District Court, certiorari denied, 321 U. S. 764. In this connection, it is to be observed that the contrary decision of the Third Circuit in the case of *Denniston* v. *Commissioner*, 106 F. 2d 925, upon the authority of which the District Court rested its decision in the case at bar, but which the court below did not mention, was, we

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decedent in contemplation of his death and concluded that, where the evidence disclosed a purpose to avoid the tax as the actuating factor for changing the form of the gift, the District Court had properly directed a verdict against the taxpayer. Moreover, in both of the *Farmers' Loan & Trust Co.* v. *Bowers*, cases, *supra*, the same court had held it sufficient to bring the transfers there in question within the statute that the purpose to avoid the tax was one of the substantially inducing motives for the transfer. See, to similar effect, *Anneke* v. *Willcuts*, 1 F. Supp. 662 (Minn.); *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851 (C. C. A. 4th); as also 1 Paul, Federal Estate and Gift Taxation, Sec. 6.05, p. 251, fn. 4. Cf. *Helvering* v. *Stock Yards Co.*, 318 U. S. 693, 699. The reason is that the statute does not confine itself to transfers made *solely* in contemplation of death. This view is supported likewise by the decisions of state courts. See, e. g., *Wimpfheimer* v. *Martin*, 127 N. J. Eq. 587; *Dommerich* v. *Kelly*, 132 N. J. Eq. 220; *Sellinger's Adm'r* v. *Reeves*, 292 Ky. 114, 119; *In re Hartford*, 122 N. J. Eq. 489, 491, affirmed *sub nom. Hartford* v. *Martin*, 120 N. J. L. 564, affirmed, 122 N. J. L. 283. See also *Estate of Boole*, 98 Cal. App. 714, 722.

believe, in effect overruled by the Third Circuit in its decision in *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, *supra*. See also *Northern Trust Co.* v. *Commissioner*, 116 F. 2d 96 (C. C. A. 7th), and *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733 (C. C. A. 2d), where it was assumed by the entire court that a release of a reserved power made to avoid the tax would come within the statute, but the Tax Court's decision was reversed by a majority of the court for lack of substantial evidence to support the Tax Court's finding that that was the motive. The applicable regulations also so provide.[6] And see further, I Paul, Federal Estate and Gift Taxation (1942), Sec. 6.07, p. 257.

The District Courts are now generally in ac-

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[6] Article 16 of Treasury Regulations 80 (1937 ed.), as amended by T. D. 4966, 1940-1 Cum. Bull. 220, reads as follows:

> This phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). *A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax*, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition. (Italics supplied.)

cord. See e. g., *Anneke* v. *Willcuts*, 1 F. Supp. 662 (Minn.); *Mather* v. *McLaughlin*, 57 F. 2d 223 (E. D. Pa.); *Brown* v. *Routzahn*, 58 F. 2d 329 (N. D. Ohio), reversed on another ground, 63 F. 2d 914 (C. C. A. 6th), certiorari denied, 290 U. S. 641; *Turner* v. *Hassett*, 37 F. Supp. 996, 998 (Mass.); *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra* (50 F. Supp. 949 (W. D. Pa.)); *Slifka* v. *Johnson* (S. D. N. Y.), decided May 22, 1945, not officially reported but found in C. C. H. Federal Inheritance, Estate and Gift Tax Service, par. 10, 205.

2. Since the statute requires the inclusion in the gross estate of the corpus of a trust which

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So also are a number of the decisions of the Tax Court, particularly the later ones. See, e. g., *Denniston* v. *Commissioner*, 38 B. T. A. 1076, 1084–1086, reversed by the Circuit Court of Appeals for the Third Circuit in 106 F. 2d 925; though, as has also been stated, that court has since in effect overruled its decision in that case by its *per curiam* affirmance of the District Court's decision in the *Commonwealth Trust Co. of Pittsburgh* case, *supra* (137 F. 2d 653); *Estate of Hofheimer* v. *Commissioner*, 2 T. C. 773, 785–786, reversed by the Second Circuit in 149 F. 2d 733, because the majority of the court concluded that there was no evidence to establish the purpose to avoid the tax; *Estate of Vanderlip* v. *Commissioner*, 3 T. C. 358, 361, now pending in the Second Circuit on a petition for review filed by the taxpayer. Cf. *Taft* v. *Commissioner*, 33 B. T. A. 671, where it was said that if there were any evidence that death or death or consideration, this would perhaps support a finding (affirmed on other grounds, 92 F. 2d 667 (C. C. A. 6th), affirmed, 304 U. S. 351.)

either contains a reserved power to alter, amend, or revoke, or where such power has been relinquished by the grantor in contemplation of his death, the point made by the court below that such relinquishment is not a transfer, and hence not a substitute for testamentary disposition, is obviously irrelevant. For the same reason it is irrelevant that the relinquishment did not involve a transfer "out of the decendent's estate" (R. 136), and that it is therefore not a substitute for testamentary disposition.[8] The power of Congress to require the inclusion in the decedent's gross estate of a transfer with respect of which such a power has been reserved, or where it is

[8] The District Court had stated the matter thus (R. 113–114):

> The statute is just a rule by which to separate property which in substance is a part of an estate from that which is not. Under that rule, if a gift in form is in reality a part of an estate, it so remains, notwithstanding the transfer. It is not the transfer which makes the property estate property but it must be estate property in substance before the transfer can be disregarded. The property is classified as estate property or not according to the fact existing at the time of transfer and not by any desire to avoid taxes. The ultimate fact which results in retaining a complete gift in the estate is a special concern about approaching death. A desire to avoid taxes has no legal effect and it has no probative value even as evidence of special concern about death, because in any transfer such a desire exists equally whether the thought of death is special or general. If a special concern about death exists, then a desire to avoid taxes becomes the motive for electing to transfer by gift instead of by will. At that point the statute applies and declares such a transfer to be in effect a gift after death.

relinquished in contemplation of his death, is not in question, and it has required the inclusion. Even so, that such reservation and such relinquishment are substitutes for testamentary disposition is established. See *Helvering* v. *City Bank Co., supra* (296 U. S. 85); *Burnet* v. *Guggenheim,* 288 U. S. 280, 286–287; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 42–43. Cf. *Fernandez* v. *Weiner,* decided December 10, 1945. Except for the relinquishment, only the decedent's death would have released the power, and by the same token only then would full dominion and control thereover have been brought into being or ripened in the beneficiaries. See *Tyler* v. *United States,* 281 U. S. 497, 503; *United States* v. *Jacobs,* 306 U. S. 363, motion to set aside judgment denied, 306 U. S. 620; *Porter* v. *Commissioner,* 288 U. S. 436, 444. Cf. *Central Hanover Bank Co.* v. *Kelly,* 319 U. S. 94, 97–98, and *Whitney* v. *Tax Commission,* 309 U. S. 530.

3. Nor is it necessary, as the court below held, that, in order to bring the transaction here within the statute, the motivating factor for the relinquishment be the decedent's belief that death is near at hand. The view that this is necessary involves a definition of "contemplation of death" which is clearly inconsistent with the holding of this Court in the *Wells* case, as well as with its holdings in *McCaughn* v. *Real Estate Co.,* 297 U. S. 606, and in *City Bank Co.* v. *McGowan,* 323 U. S. 594. These decisions make it plain that the

Congressional purpose was not to restrict the application of the statute to situations where the decedent turns to a consideration of the final disposition of his property because he thought he was about to die. The statute is satisfied where, for any other reason, the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control, or in some manner affect, its devolution. In such a situation the fact that the decedent is past middle age may prove to be an important consideration—though that the decedent need be in advanced age has been denied (*First Trust & Deposit Co.* v. *Shaughnessy, supra*). His state of health has also been regarded as irrelevant (*McCaughn* v. *Real Estate Co., supra; First Trust & Deposit Co.* v. *Shaughnessy, supra*). Indeed, if it were not irrelevant, such case as *City Bank Co.* v. *McGowan, supra, Commonwealth Trust Co. of Pittsburgh* v. *Driscoll, supra, In re Kroger's Estate*, 145 F. 2d 901 (C. C. A. 6th), certiorari denied, 324 U. S. 866, and *Pate* v. *Commissioner*, 149 F. 2d 669 (C. C. A. 8th), could not have been decided as they were.

It will in this connection be noted that the Court in the *Wells* case (283 U. S., p. 114, fn. 9) cited with evident disapproval a number of cases upon which the lower court had relied, holding that, to bring a transfer within the statute, there must be a present apprehension, from some

existing bodily condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause of the transfer.[9] The Court also called attention to a number of other decisions to the same effect, both state and federal, not cited by the lower court, the federal cases being *Gaither* v. *Miles*, 268 Fed. 692 (Md.), *Vaughan* v. *Riordan*, 280 Fed. 742 (W. D. N. Y.), *Flannery* v. *Willcuts*, 25 F. 2d 951 (C. C. A. 8th), and *Beeler* v. *Motter*, 33 F. 2d 788 (Kans.).[10]

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[9] Among the cases which the Court thus listed are *Spreckels* v. *State of California*, 30 Cal. App. 363, which held that expectation of death must be the immediate and prompting motive for the transfer—that it must be the motive without which the transfer would not have been made; *Shwab* v. *Doyle*, 269 Fed. 321 (C. C. A. 6th), which on appeal to this Court was reversed on another ground, 258 U. S. 529, so that the question of the correctness of the Sixth Circuit's similar definition was not considered, although that question was extensively argued both on briefs and oral argument, the Government there, too, contending for a broader construction of the statute; *Rea* v. *Heiner*, 6 F. 2d 389 (W. D. Pa.), and *Starck* v. *Commissioner*, 3 B. T. A. 514.

[10] As opposed to this view the Court in the same footnote cited, among others, *Tax Commission* v. *Parker*, 117 Ohio St. 215, writs of error dismissed, 278 U. S. 566, involving an Ohio statute which defined the term "contemplation of death" as meaning the expectation of death which actuates a person in making a will. In that case, the Ohio court pointed out (pp. 221–222) that it is the exception rather than the rule that minds of men are actuated to make a will because of a sense of impending death; that generally they make wills when additional moral obligations have

If further proof were needed that Congress did not intend to use the phrase "made in contemplation of death" in the sense of "made in contemplation of dying," it lies in the fact that its application in the latter sense to a relinquishment of a reserved power to amend a trust would be meaningless. For, since a grantor must always be aware of the fact that his death would, without more, inevitably result in the release of the power, it would be purposeless for him to release it solely because he expected the very event to happen which would automatically release it. Thus to restrict the tax on relinquishments to cases where the grantor acted in the belief he was dying would lead to the incongruity that Congress imposed a tax upon an event which would never happen.

Since the thought of dying is not the only occasion which leads a person to consider the question of a final disposition of his property, it is not to be supposed that Congress would place such a limitation upon a revenue measure. The entering into of a second marriage not infrequently is such an occasion. See *In re Kroger's Estate, supra;* [11] *Pate*

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been assumed and the controlling fact in determining whether a gift was made in contemplation of death is whether the gift is in the nature of a testamentary distribution of property rather than the bestowal of a favor upon the donee. See also comment on that case in *Burton, Exr.* v. *Tax Commission*, 37 Ohio App. 183, 187–188.

[11] In this case the Sixth Circuit (145 F. 2d 901, 907) disagreed with the contrary view of the Third Circuit in *Lippin-*

v. *Commissioner, supra;* also *Nicholas* v. *Martin,* 128 N. J. Eq. 344. Similarly, the occasion presented in *City Bank Co.* v. *McGowan, supra,* was not the decedent's thought of dying, but the demand of her daughter and the guardian of the minor children of her deceased daughter that they be given a portion of her estate then instead of having to await her death, because she had become insane and could not use it and they would get it in any event when she died. And, in *McCaughn* v. *Real Estate Co., supra,* the occasion which caused the decedent to turn to a consideration of the devolution of his property was the thought that his children would dissipate it if and when they received it in the ordinary course of events. Accordingly, he placed it in a spendthrift trust for them.

Similarly here, the occasion for the decedent's turning to a consideration of a relinquishment of the reserved power was not the thought of dying. It was that his son had advised him that, in view of the decision of this Court in *Helvering* v. *City Bank Co., supra,* the consequence of its retention would be the inclusion of the corpora of the trusts in his gross estate for estate tax purposes. Emphatically, he did not want that to happen. Thus his concern was with what would happen to his

*cott* v. *Commissioner,* 72 F. 2d 788, as also with that of the Seventh Circuit in *Kaufman* v. *Reinecke,* 68 F. 2d 642, where the decedent had made a gift to his wife of stock in order to prevent his brothers from getting it at his death under a contract he had made with them.

estate at his death, and his sole purpose in relinquishing the power was to conserve it against a claim of the Government for the additional estate tax resulting from the inclusion of the corpora of the trusts therein. And so he relinquished the power in order to avoid the tax.

The examples given will suffice to prove the point, although they could be multiplied. Nevertheless, the difficulty which the Government has encountered in the equal administration of the law has been that not only the federal courts, but the Tax Court as well, have at times interpreted the *Wells* case as holding that the question whether a decedent made a transfer in contemplation of his death within the meaning of the statute is made to depend upon whether the thought of dying as the tentatively assumed motivating factor therefor was disproven by life purposes. The evidence adduced by the beneficiaries more or less tends to establish some life purpose because it is inevitable that a living person will secure relief from the worries of the management of the transferred property, and will save income taxes. Other incidental life purposes may be the equalization of gifts among children, and the like. But such life motives are not inconsistent with, and therefore do not overcome, the Commissioner's determination of a death motive, unless the statute is properly restricted to transfers made with the thought of dying. But this interpretation of the statute,

or rather this interpretation of the holding in the *Wells* case, has not only thwarted the purpose of Congress to prevent evasion of the tax,[12] but runs counter to the very theory of estate taxation, that the transmission of property from one generation to another shall bear its just proportion of the burden of the tax.[13]

Thus, the real question, adverted to by the Ohio court in *Tax Commission* v. *Parker*, 117 Ohio St.

[12] The situation in which the Government thus finds itself in the administration of the law is graphically described in Harriss, *Gift Taxation in the United States*, 13–19 (1940). See also Harriss, *Gifts in Contemplation of Death*, 19 Tax Magazine 216, 219 (April, 1941); Eisenstein, *Are We Ready for Estate and Gift Tax Revision?*, 23 Tax Magazine 316, 319 (April, 1945); Atlas, *Gifts in Contemplation of Death*, 23 Tax Magazine 421 (May, 1945); Pavenstedt, *Taxation of Transfers in Contemplation of Death: A Proposal for Abolition*, 54 Yale L. J. 70; and the Report to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes, Vol. II, Part 2, p. 111 (1933).

[13] Harriss, *Gift Taxation in the United States*, 19–20 (1940), refers to this as the economic test and points to the fact that four cases tend, in varying degrees, to support it, namely, *McCaughn* v. *Real Estate Co.*, 297 U. S. 606; *Tax Commission* v. *Parker*, 117 Ohio St. 215, writs of error dismissed, 278 U. S. 566; *Will of Harnischfeger*, 208 Wis. 317 (cf. *Harnischfeger* v. *Commissioner*, 31 B. T. A. 224, 231, involving the same transfers); and *Schweinler* v. *Thayer-Martin*, 117 N. J. Eq. 67, affirmed, 13 N. J. Misc. 722. To these cases could now be added *City Bank Co.* v. *McGowan*, 323 U. S. 594; *Scheider* v. *Martin*, 127 N. J. Eq. 323, affirmed, 124 N. J. L. 567, and *Nicholas* v. *Martin*, 128 N. J. Eq. 344, as well as such cases as *In re Kroger's Estate*, 145 F. 2d 901 (C. C. A. 8th), certiorari denied, 324 U. S. 866, and *Pate* v. *Commissioner*, 149 F. 2d 669 (C. C. A. 8th).

215, writs of error dismissed, 278 U. S. 566, has too often been ignored—namely, whether the gift is in the nature of a testamentary distribution of property rather than the present bestowal of a favor upon the donee. This is not to say that the motive in making the gift is immaterial. It is merely to say that a death motive may be deduced from the evidence as a whole and particularly from the nature of the transfer, and should be deduced from the transfer itself when the decedent, especially if he is in advanced years, transfers a substantial part of his property by way of trust or otherwise to the natural object of his bounty in much the same way as he would otherwise have done by his will. See *Dommerich* v. *Kelly*, *supra* (132 N. J. Eq. 220), cited in footnote 5, *supra*, p. 17, and cf. *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll*, *supra* (50 F. Supp. 949).

The court below should, therefore, have considered it no longer open to question that death need not in any case be contemplated in the sense that it is feared or expected, in order to bring either a transfer or a relinquishment of a power reserved therein to revoke, alter, or amend within the contemplation of death provisions of the statute. It should have considered it sufficient to show that the motivating factor was a death purpose.

## CONCLUSION

The decision of the Circuit Court of Appeals should therefore be reversed and the District Court directed to enter a judgment for the petitioner, the defendant in that court.

Respectfully submitted.

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SAMUEL O. CLARK, JR.,
*Assistant Attorney General.*
SEWELL KEY,
J. LOUIS MONARCH,
CARLTON FOX,
*Special Assistants to the Attorney General.*

DECEMBER, 1945.

## APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Sec. 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, tangible or intangible, wherever situated—

* * * * * *

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

(2) For the purposes of this subdivision the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases the proper adjustment shall be made representing the interests which would have been excluded from

the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

(3) The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

* * * *

Treasury Regulations 80 (1937 ed.):

ART. 21. *Power relinquished in contemplation of death.*—If the decedent had previously held, either alone or in conjunction with another person or persons, a power to alter or amend, or revoke, or terminate a transfer made by him, and the power was subsequently relinquished in contemplation of the decedent's death (the relinquishment not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), then to the extent that the transferred property or any interest therein had been subject to such relinquished power it is to be included in the gross estate if coming within any one of the following paragraphs:

(1) Regardless of when the transfer was made, if the power was reserved at the time of the transfer and was relinquished and the decedent died after the enactment of the Revenue Act of 1916 (September 8, 1916), and the power was exercisable by the decedent alone or in conjunction with a person or persons having no substantial adverse interest or interests in the transferred property, or if exercisable in conjunction with a person having a substantial adverse interest or with several persons some or all of whom held such an adverse interest, then to the extent of any interest or interests held by a person or persons not required to join in the exercise of the power and any adverse interest which was not substantial.

(2) When the transfer was made after the enactment of the Revenue Act of 1924 (4:01 p. m., eastern standard time, June 2, 1924) and before the amendment of the subdivision by the Revenue Act of 1936 became effective (June 23, 1936), and the power was reserved at the time of the transfer and its relinquishment and the decedent's death subsequently occurred, and the power was exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

(3) When the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936) and the relinquishment of the power and the decedent's death subsequently occurred, and the power was either reserved at the time of

the transfer or later created or conferred, without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

Within the meaning of this article, it is essential to a relinquishment of a power which is exercisable by the decedent in conjunction with another person or persons that the relinquishment by such other person or persons operates as a complete relinquishment of the power.

If the relinquishment be not admitted or shown to have been in contemplation of decedent's death, but occurred within two years prior to such death, and affected the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value in excess of $5,000 (as of the date of decedent's death, or as of the applicable date under such an election as is referred to in the second paragraph of article 15) then, to the extent of such excess, the relinquishment will be deemed, unless shown to the contrary, to have been in contemplation of decedent's death. (See article 15.)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

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MARION H. ALLEN,
Collector of Internal Revenue,
*Petitioner*,

v.

TRUST COMPANY OF GEORGIA and
HUGHES SPALDING,
Executors of the Estate of Jack J. Spalding,
Deceased,
*Respondent*

NO. 289

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## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

# INDEX

CITATIONS: None

TOPICAL INDEX:


| | Page |
|---|---|
| 1. The petitioner presents the case to this Honorable Court on a different factual footing from that decided by the Trial Court and affirmed by the Circuit Court of Appeals | 1-3 |
| 2. Brief statement of the facts upon which the decision of the two Courts below rests | 3-10 |

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---

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Responding through their counsel, John A. Sibley, to the petition for a writ of certiorari in the above entitled matter, Trust Company of Georgia and Hughes Spalding, Executors of the Estate of Jack J. Spalding, deceased, pray that the writ of certiorari be denied for the reasons hereinafter stated:

No question of public interest is presented nor is there any conflict in the authorities. Petitioner's legal arguments are anwered by a consideration of the facts as found by the Trial Court and affirmed by the Circuit Court of Appeals.

The legal question stated by petitioner fails to give effect to the controlling facts found by the Trial Court and presents the case on a factual footing different from that decided by the Trial Court and affirmed by the Circuit Court of Appeals.

As the basis for its legal argument, the petitioner quotes the last clause of the first sentence of Finding 12 (Petition p. 4). The clause quoted is:

> "* * * so that they (the trusts) would not be a part of his estate for estate tax purposes."

The entire sentence reads:

> "12 — Mr. Spalding made the releases of May 1, 1937, *for the purposes of putting the trusts in the condition, which he had thought they were in when made*, so that they would not be a part of his estate for estate tax purposes." (R. 218) (Emphasis ours).

That sentence of Finding 12, taken in its entirety, makes clear that the Lower Court found that Mr. Spalding in making the releases of May 1, 1937, was actuated by the same motive and purpose that he had when the trusts were established in 1925 and enlarged.

Moreover, petitioner in stating the question involved, gives no significance to Finding 13 and related findings. Finding 13 reads:

> "13 — He was motivated in making the gifts by his desire to meet the necessities of his children and to set aside property solely for the benefit of them and their families, freed of all claims, tax and otherwise, and the release of the power on May 1, 1937, falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934." (R. 218).

Manifestly, petitioner places the decision of the case upon an entirely different factual footing from that dealt with by the Trial Court and affirmed by the Circuit Court of Appeals.

This omission on the part of petitioner to give consideration to all the facts, brought forth from the Circuit Court of Appeals the finding that the plaintiff's case is "supported by the circumstances and facts in evidence in so far as actualities are concerned, but in view of the artificialities injected into the case, a mixed question of law and fact is involved. * * *" (R. 229).

A brief statement of the controlling facts upon which the Trial Court and the Circuit Court of Appeals based their decisions, will show that petitioner, in presenting this case, has eliminated many controlling facts which were given consideration and significance by the Lower Courts.

The controlling facts, as found by the Trial Court and affirmed by the Circuit Court of Appeals, make it clear that the real divergence of views between petitioner and both Courts below, turns not on the decision of any legal question but on a proper consideration of the controlling facts.

The essential facts referred to, found to be true by the Trial Court and affirmed by the Circuit Court of Appeals, make this factual divergence of views between petitioner and both Courts below very clear. Briefly stated, they are as follows:

Mr. Spalding, the settlor, a successful attorney of substantial wealth, made gifts in modest amounts to his children upon the principle of equality. Upon the marriage of his son Hughes and his daughter Suzanne in 1912 he gave each a home of the value of $15,000.00 and to his unmarried son Jack he gave

stock of equal value in a local business concern. In 1918 he made another gift to each of his children of $18,000.00 either in cash or its equivalent. The gifts were outright and the subject matter of the gifts was delivered to his three children. (Finding 5, R. 214).

His theory was to put the title and possession of these gifts absolutely in his children so as to determine whether they were capable of handling their money successfully, and later when he found that they were not, he resorted to the trust form of gift to protect them against their own business misadventures. (R. 151-2).

His daughter Suzanne formed an unlimited partnership with her husband in a cotton oil mill business and put into it all of her financial resources, including her home. The business met financial disaster after World War I on account of cancellation of contracts. Suzanne not only lost all of her assets, including her home, in the venture but was liable jointly with her husband on bank indebtedness for $80,000.00. (R. 103). In December, 1924, Mr. Spalding advanced $10,000.00 to have Suzanne released from the bank obligation. (R. 103)*

Mr. Spalding's son Jack had made unfortunate business investments by which he lost the money that Mr. Spalding had previously given to him. He had moved to Mexico City and was supported in part upon a monthly allowance from his father. (Finding 7, R. 215-16; also R. 117).

As a result of the pressing financial necessities of Suzanne, Mr. Spalding made the gifts of June 15, 1925, and instead of delivering the funds outright to her and to Jack as he had on

*The date December 20, 1934, is a misprint. The correct date is December 20, 1924.

previous occasions, he put the gifts in the form of trusts, in order to protect them "against their own business misadventures and not to retain any benefit directly or indirectly to himself." (Finding 8, R. 216).

Prior to 1934 Mr. Spalding's oldest son had invested heavily in real estate and in the stock market and suffered severe losses because of the depression of 1929, which continued through the thirties. This son had a wife and five children, all minors or in college at that time. He was faced with insolvency. In order to help him and relieve his financial embarrassment, Mr. Spalding gave to him $50,000.00 outright and purchased from him $90,000.00 of real estate to be applied on his debts. At that time Mr. Spalding added an equal amount to the trusts in favor of Jack and Suzanne, except that Suzanne was given a fee simple title to the house in which she lived of the value of $19,000.00, then owned by Mr. Spalding. (Finding 7, R. 216).

At the time the two trusts in favor of Suzanne and Jack were created in 1925 and enlarged in August, 1934, Mr. Spalding believed that the gifts were complete and absolute and that the trust property passed from him for all purposes, including estate taxes, and so intended. He was fully justified in that belief in view of the decisional law at that time. He returned and paid gift taxes upon the full value of the gifts that were made in 1925 and 1934 and he intended that the gifts should be absolute and complete. (Finding 9, R. 217).

On or about April 27, 1937, Mr. Spalding learned for the first time that under the decision of the *City Bank & Farmers Trust Company v. Commissioner*, 296 U. S. 85, that the gifts were not absolute and complete but that they remained a part of his estate and would be included therein for estate tax pur-

poses. Obviously, this was contrary to his intention at the time the trusts were executed. Thereupon Mr. Spalding, on May 1, 1937, executed an instrument renouncing the power reserved in the trust. (Finding 10, R. 217).

The information came to Mr. Spalding in this manner: His son Hughes, who was a member of Mr. Spalding's law firm, had been employed to draft suitable trusts conveying a life estate to a client's children with remainder over to grandchildren. Client intended and desired to make absolute gifts. Hughes used the same form of trust instrument that had been executed by his father in creating the trusts in favor of Suzanne and Jack. Hughes believed that form of instrument conveyed absolute gifts for all purposes, including estate tax purposes. The instruments were duly executed by Hughes' client in that form. When they were sent over to the trustee bank, an officer of the bank called attention to the fact that the gifts were not completed under the recent case of *City Bank and Farmers Trust Company v. Commissioner, supra.* Immediately Hughes so informed his client and suggested that the reserved powers be renounced and the instrument corrected. (R. 136-7-8-9). The matter took that course. Knowing that his father was under the impression that these trusts in favor of Suzanne and Jack conveyed absolute gifts, Hughes sent in to Mr. Spalding a copy of the letter to his client with the notation that the question might be one of interest to him. Mr. Spalding took exactly the same course with respect to these trusts in favor of Suzanne and Jack that the client, upon Hughes' recommendation, took with respect to the trusts the client had so recently executed. In both instances the powers were renounced so that the instrument might speak the original intention of the parties. (R. 138-9-40).

At the time of the renunciation of the power, Mr. Spalding

made no other gifts to his children. At that time and at the time of his death he was worth approximately a million dollars. His estate, for estate tax purposes, was valued at $929,000.00 (R. 140). He made no effort to lessen his estate tax by making any additional gifts. If his purpose was to avoid taxes because of the thought of death he had ample opportunity to do so by making additional gifts. He was a man of great integrity. He merely cancelled the powers which at the time they were reserved were without legal significance but which in view of later decisions turned a gift, which he thought and intended to be absolute and complete, into one that was not absolute and complete. By releasing the powers, Mr. Spalding made the instruments speak that which he had originally intended that they should speak. Admittedly, he made the gifts for the benefit of his children, to meet their necessities, intending at the time to free the subject matter of the gift from all liability, including estate tax liabilities.

Both courts below held that where the motive for the gift is to help settlor's children who are in financial distress and settlor's purpose is to make a complete gift but that purpose fails because of misapprehension of the legal effect of the instrument, settlor may therefore correct the instrument to speak his original intention, thereby his motive is not to evade taxes in the statutory sense but to make the gift absolute in favor of his children, as he originally intended.

The Circuit Court of Appeals, after an exhaustive examination of the facts and findings of the trial court, dealt with the case, as did the Trial Court, on that footing. The Circuit Court of Appeals said:

> "But when it is asserted that a person acts in contemplation of death in the relinquishment of a power to alter

a transfer previously made for the protection of his children and the equalization of his bounty merely because he wishes the transfer to have the tax consequences that he originally intended, to-wit: the freedom from death taxes against his estate and his heirs, a novel concept is projected into the brain of the uninitiate." (R. 229-230).

Continuing the same line of thought, the Lower Court said:

"When, however, the settlor became apprised of the fact that the retention of the right to amend the terms by which a trust would be managed, or by which the income from the property might be enjoyed, might result in encumbering or burdening the cestui que trustent or the corpora by rendering them liable to a tax (as in the case of the retention of the right to revoke the enjoyment of a transfer), and that his gifts had not been as complete as he had intended, he set about promptly to free the property from the encumbrance or burden of a tax liability. That is no death purpose." (R. 233).

No argument is required to demonstrate that a donee who holds property freed from all tax liability is in a better position than one who holds property subject to such liability, even though the donee's liability may be secondary and the estate, which is primarily liable may be solvent at the time the gifts are made. Mr. Spalding had always intended that the donees should hold the subject matter of the trusts freed of all claims, including the claims of the Government. He paid the gift tax to satisfy the Government's claim.

This record and the physical exhibits show that Mr. Spalding was a man of unusual ability and great integrity. He had business sagacity and was able to create a competency. He never lavished his wealth upon his children. His gifts to his children were always modest in comparison to his wealth and

were limited to their necessities. This policy was not due to any spirit of greed but grew out of a sound philosophy of his life that too much indulgence is bad for character. He voluntarily imposed restrictions on the amount of wealth that he accumulated. (R. 98). He would not permit himself to yield to the temptation of personal greed. He would not accumulate at any one time property exceeding in value a million dollars. From 1920 to the date of his death he gave large amounts to charities. The charitable gifts alone, in amounts exceeding $1,000.00, totaled a sum equal to all the distributions to his children. (R. 140-1-2). He gave additional substantial sums not strictly to charity but to worthy causes in memory of his deceased friends. (R. 142). His career was distinguished as a lawyer and his good works in the cause of his church and charity were so widespread that in 1928 the Laetare medal was conferred upon him as the most outstanding Catholic layman in the United States for that year.

No rule of law can be found to turn honest conduct into a dishonest act.

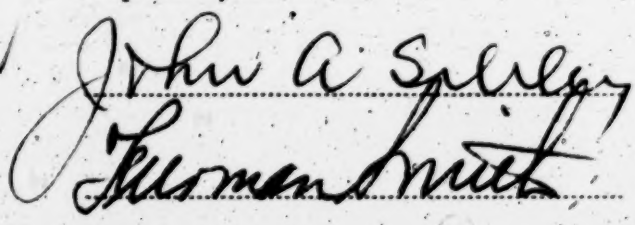
In the final analysis the case that was passed on by the Trial Court and the Circuit Court of Appeals is a different case on the facts from the one that is presented in the petition for certiorari.

This case is one which actually turns on its own special facts and does not involve any legal principle of general importance nor any unsettled question of law nor any conflict among the circuits.

As the Lower Court pointed out, it is only by substituting "artificialities" for "actualities" that petitioner can find even

the slightest basis for an argument in this case. The petition for the writ of certiorari should be denied, as the question is a factual one, which was correctly decided by the Trial Court and affirmed by the Circuit Court of Appeals.

Respectfully submitted,



Attorneys for Trust Company of Georgia and Hughes Spalding, Executors of the Estate of Jack J. Spalding, Deceased, Respondents.

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IN THE

# Supreme Court of the United States

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**No. 289.**

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**MARION H. ALLEN**, Collector of Internal Revenue,
*Petitioner,*

*v.*

**TRUST COMPANY OF GEORGIA and HUGHES SPALDING**, Executors of the Estate of **JACK L. SPALDING**, Deceased,
*Respondent.*

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# RESPONDENT'S BRIEF.

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## INDEX TO BRIEF.


| | Page |
|---|---|
| PETITIONER'S SPECIFICATION OF ERRORS AND SUMMARY OF RESPONDENT'S POSITION | 1 |
| ARGUMENT | 5 |
| (a) The Circumstances Under Which the Trusts Were Established | 5 |
| (b) Circumstances Under Which Powers Were Relinquished | 8 |
| (c) The Gifts Were Complete and Absolute as the Law Was Construed When the Trusts Were Created | 10 |
| PETITIONER'S POSITION NOT SUSTAINED BY AUTHORITIES | 19 |
| CONCLUSION | 26 |

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Bradley v. Smith, 114 F. (2d) 161 (C. C. A. 7, 1940) | 14 |
| Brown v. Commissioner, 74 F. (2d) 281 (C. C. A. 10, 1934) | 14 |
| Chisholm v. Commissioner, 79 F. (2d) 14 | 25 |
| City Bank and Farmers Trust Company v. Commissioner, 296 U. S. 85 | 8, 10 |
| Commonwealth Trust Company of Pittsburgh v. Driscoll, 50 F. Supp. 949, 950, 951 (affirmed on the opinion below 137 F. (2d) 653) | 19, 22, 25 |
| Denniston v. Commissioner, 106 F. (2d) 925 | 14, 19, 22, 24, 25 |
| Dobson v. Commissioner, 320 U. S. 489, 493, 502, 503 | 13, 27 |
| Farmers Loan & Trust Co. v. Bowers, 68 F. (2d) 916, 923, 924 | 19, 20, 21, 22, 24, 26 |
| First Trust & Deposit Company v. Shaughnessy, 134 F. (2d) 940, 942 | 19, 22 |
| Gregory v. Helvering, 293 U. S. 465, 469 | 25 |
| Kroger v. Commissioner, 145 F. (2d) 901 | 19 |
| McCaughn v. Real Estate Company, 297 U. S. 606 | 15 |
| Reinecke, Collector v. Northern Trust Co., 278 U. S. 339 | 10 |
| United States v. Wells, 283 U. S. 102, 120 | 2, 3, 4, 14, 15, 22 |

IN THE

# Supreme Court of the United States.

No. 289.

MARION H. ALLEN, COLLECTOR OF INTERNAL REVENUE,

*Petitioner,*

*v.*

TRUST COMPANY OF GEORGIA AND HUGHES SPALDING, EXECUTORS OF THE ESTATE OF JACK L. SPALDING, DECEASED,

*Respondent.*

## RESPONDENT'S BRIEF.

Respondent's contentions and the points of departure between the position of petitioner and respondent can readily be developed and elucidated by dealing directly with petitioner's Specification of Errors. The Specification of Errors advance three grounds of objection to the decree. In the presentation of respondent's argument, the specification of errors will be rearranged and renumbered in the order of their respective importance. The specification of each alleged error will be stated seriatim, followed by a statement of respondent's position, in lieu of a summary of respondent's argument.

## PETITIONER'S SPECIFICATION OF ERRORS AND SUMMARY OF RESPONDENT'S POSITION.

(1) "(3) In failing to hold that the respondents had not sustained the burden of proof resting upon them to show that the relinquishment in question was not made in such contemplation."

The question here presented is one of fact and is the controlling question in the case. Under the facts found by the Trial Court, the burden of proof was fully carried by respondent. These facts were reviewed by the Circuit Court of Appeals and expressly approved. That Court said:

> "All finding of facts from 7 through 13, inclusive, have substantial support in the evidence. Finding No. 14 to the effect that the renunciation of the power to amend, executed on May 1, 1937, 'was not made in contemplation of death in the statutory sense,' is supported by the circumstances and facts in evidence insofar as the actualities are concerned. * * *"

The case is controlled by the rule announced in *United States v. Wells*, 283 U. S. 102, 120, wherein this Court, in affirming the judgment of the Court of Claims, said:

> "In the presence of such a motive appropriately found and of the underlying facts which have been expressly found, there would be no ground for a reversal of the judgment merely because of an inaccuracy in the general statement as to the meaning of a statutory phrase."

Regardless of any inaccuracy of statement by the Court below as to the meaning of the "statutory phrase" "in contemplation of death", the decree in this case should be affirmed upon findings of fact of the Trial Court, and the underlying facts supporting those findings.

(2) "(1) In holding that a relinquishment of a power to amend, change, enlarge or limit a trust, reserved therein by the decedent, was not made by him in contemplation of his death within the meaning of Section 302 (d) (1) of the Revenue Act of 1926, as amended, even though in making it the decedent was motivated solely by a purpose to prevent the inclusion of its corpus in his gross estate at his death in order to avoid the additional estate tax resulting from such inclusion."

That statement of alleged error is merely a statement in a narrower form of the factual proposition involved in grounds No. 1 above, and the two specifications of error may be treated together. In that statement of the Specification of Errors, petitioner omits from consideration relevant and controlling facts and circumstances surrounding the execution of the original transfers that influenced the Trial Court in reaching the ultimate conclusion of facts that the gifts were not made "in contemplation of death." The Trial Court gave consideration to the facts and circumstances surrounding the creation of the trust and the inducing cause for making the same, as well as the facts and circumstances surrounding the relinquishment of the powers. The inducing motive for establishing the trusts, the reasons why the trusts were in that particular form, the legal effect of the trusts as originally executed as understood by the settlor, were all vital and relevant matters to be considered in connection with the release of the powers in determining settlor's motive in making the gifts. The District Court, sitting as the trior of the facts, treated the establishment of the trust and the relinquishment of the powers "as steps in an integrated transaction" in determining the donative intent of the settlor. The position of petitioner denies to the District Court the right to so treat the transaction and seeks to have this Court as a matter of law to hold that the relinquishment of the powers and the creation of the trust are totally unrelated and cannot be viewed together in determining settlor's motive in making the gifts.

(3) "(2) In holding that a relinquishment so motivated was not made in contemplation of his death unless the decedent deemed death to be near at hand."

That specification of error is immaterial if, as a matter of fact, the judgment is otherwise correct in the light of the findings of the Trial Court. *United States v. Wells, supra.*

The specification also becomes immaterial in view of the findings of fact by the Trial Court, to-wit:

> "However, in making such releases Mr. Spalding was actuated by the thought of death only to the extent that thoughtful men habitually act with regard to ultimate death, and he did not in 1925, 1934, and 1937 entertain thoughts of death except the general expectation of death that all entertain." (R. 123, 124.)

The facts found to be true by the District Court satisfies the requirements of the rule when correctly stated. "It is recognized that the reference is not to the general expectation of death which all entertain." (*United States v. Wells*, 283 U. S. 102, 115.)

Petitioner's admissions in its Brief, page *, makes the question immaterial:

> "While the decedent was 81 years of age at the time he released the power, the Government does not claim that he was motivated in doing so by any fear or expectation of death induced by his age or by the condition of his mind or body."

A substantial part of petitioner's brief is devoted to a discussion of a point that cannot control or affect the outcome of this case in view of the findings of fact and admission in petitioner's brief.

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* Typewritten copy served on Respondent.

## ARGUMENT.

The facts found by the trial court sitting as a jury are amply supported by the record.

### (a) The Circumstances Under Which the Trusts Were Established.

The record shows that settlor was a man of integrity and distinction. He received the Notre Dame award of the Laetare Medal in 1928 and was knighted by his Church for his religious and charitable work. In addition to his business and legal activities, he actively participated in church, public and charitable affairs until just a few months before his death. He was a delegate to the National Democratic Convention at Chicago in 1932 and again in 1936 at Philadelphia, and took an active part in its proceedings. He led the fight against Talmadge rule in Georgia, and on August 15, 1936, just fourteen days before his eightieth birthday, he made a vigorous speech that the press characterized as the "Death Knell of Talmadgeism in Georgia." In May, 1937, he attended the Kentucky Derby, driving there by automobile, and on his eighty-first birthday he attended a meeting of the Society of St. Vincent de Paul at St. Paul, Minnesota, traveling by automobile. He was elected President of the Atlanta Historical Society in July, 1936, and remained its head until January, 1938. During his presidency the membership of the Society increased five-fold.*

No claim is made that the creation of the original trust or the relinquishment of the power was influenced by any special thought of death. It is admitted that the trusts were created for the purpose of relieving the distress of settlor's children and to equalize gifts among them.

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* A resumé of settlor's activities during the later years of his life may be found in the black bound scrap book, which was sent up as part of the record as a physical exhibit.

He always made gifts to his children on the principle of equality. (R. 57, 121.)

In 1912 he made a gift of a home to his son Hughes and to his daughter Suzanne of the value of $15,000, and soon thereafter gave stock of equal value to his son Jack. (R. 121.) In 1918 he made another gift of $18,000 either in cash or its equivalent to each of his children (R. 122). These gifts were outright and the property was delivered to each child.

Settlor's daughter Suzanne lost her money in an oil mill venture with her husband. As a result, she was without means. She was in debt jointly with her husband to the extent of $86,000. Her husband was without employment and they had five minor children to support.

His son Jack had lost his money and settlor had put him on a monthly allowance.

The trust instruments were set up to meet the needs of Suzanne and her children and Jack and his family. In order to protect Suzanne and Jack "against their own business misadventures and not to retain any benefit directly or indirectly to himself, the gifts were put in trust and not delivered to them because of past experience in handling prior gifts." (R. 123, Finding 8.)

In creating the trusts, he believed that he had adopted and settlor intended to adopt an instrument "that passed title to the trust property absolutely out of him for all purposes, including estate taxes." (R. 123, Finding 9.) Believing that he had made absolute and completed gifts he paid gift taxes upon the full value of the gifts.

In his letter of June 15, 1925, to his daughter Suzanne, settlor sent a copy of the trust agreement, telling her that the "trust will yield you $300.00 a month for living money and you will see that after your death it will be administered and paid over to your children until the youngest becomes twenty-one years of age, when it will be equally divided between them. If any misfortune should take off the five fine children you now have and you have no other

left at your death, it will then be in your power to provide in advance by making a will disposing of the corpus of this fund to whomsoever you please." (R. 62, 63.)

A letter of similar import was written to Jack on the same day.

No mention in these letters was made of the powers reserved in the trust, as settlor no doubt considered the reservation of the powers without legal significance.

When the trusts were enlarged in 1934, settlor's son Hughes was financially embarrassed. Hughes had purchased real estate in Miami for $60,000, the value of which had been destroyed by a hurricane which blew away the bulkheads causing the land to be washed back into the bay. (R. 69.) He had purchased real estate in Fulton County that cost him $112,000 and was heavily involved in the stock market. He was caught in the panic that began in 1929 and continued through the early thirties. The settlor gave to his son outright $50,000 in money or its equivalent and purchased from him his Fulton County property for $90,000, all of which was applied on Hughes' debts. (R. 68.)

Settlor was amply able to give to his son Hughes sufficient funds to meet his financial needs. Instead of that he gave him only $50,000 and purchased from him real estate in the amount of $90,000. This real estate was owned by settlor at the time of his death and was returned for estate taxes. The size of this gift was limited to the amount Hughes needed to meet his obligations.

Settlor held an unusual view about his own wealth. He was a man of great business sagacity but he never wanted to be worth over a Million Dollars. He made large distributions to charity in equal or in greater amounts than the gifts to his children. (R. 79, 123.) At his death, exclusive of the property in dispute, his estate for estate tax purposes was valued at approximately a million dollars. (R. 86.) *

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* See Findings of Fact 5, 7, 8, 9. R. 121, 122, 123.

**(b) Circumstances Under Which Powers Were Relinquished.**

J. J. Haverty, a client of settlor's law firm, desired to make gifts in trust to his children and grandchildren and "pass his complete title out" (R. 77) and consulted for that purpose settlor's son and law partner, Hughes Spalding. Settlor's son Hughes, knowing Haverty's desire to make completed gifts to his children and grandchildren, used the form of trust instrument that settlor had employed in making the gifts to his daughter Suzanne and his son Jack—reserving therein the identical powers now under review. He adopted that form of instrument for the Haverty trust "thinking it was airtight and had accomplished the purpose" (R. 77), the purpose being to make an absolute and completed gift. It was Hughes Spalding's legal opinion that the reservation of such powers did not "in anywise keep the trust from being a completed gift." His law firm and settlor held the same opinion at the time the Spalding trust was established in 1925 and enlarged in 1934. (R. 65; 63.)

The First National Bank of Atlanta was named Trustee under the Haverty trust and when the trust instrument was delivered to the Trustee, the Trust Officer called Mr. Hughes Spalding's attention to *City Bank and Farmers Trust Company v. Commissioner,** and as expressed by Mr. Hughes Spalding "that in this Haverty case what we thought the law was, was not the law." (R. 77.)

When Mr. Hughes Spalding was faced with the proposition that he had misapprehended the legal effect of the transfers, he immediately by letter called the attention of his client to the mistake and proceeded to "get the thing straightened out." (R. 77.)

In that letter to his client of April 22, 1937, Mr. Hughes Spalding said that "the instruments creating the gifts would fail to take these gifts out of your general estate."

* 296 U. S. 85.

(R. 77.) He recommended that the reserved powers be relinquished and set out in the letter a form of relinquishment. (R. 78.)

A copy of that letter from Hughes Spalding to Mr. Haverty with this notation at the bottom was placed on the desk of settlor:

> "The contents of this letter will interest you. I prepared the trust for Mr. Haverty, using the ones you had prepared in connection with Jack and Suzanne. The same provisions are in those trusts and you may wish to amend them."

"Promptly thereafter, on May 1, 1937, settlor relinquished the powers reserved in the trust instrument." (R. 79, 13.)

Regarding settlor's motive for the release, the Trial Court stated:

> "He made the release, not because he had in mind thereby to effect substantially a testamentary disposition in a different form, but because he desired to take the property out of his estate as he thought he had already done. He was not contemplating his death, except in the general sense, *but was motivated by what he considered a change in the law*, and made the release to effect his original intention without regard to when his death might occur." (R. 118.)

Likewise the Court expressly found:

> "13. He was motivated in making the gifts by his desire to meet the necessities of his children and to set aside property solely for the benefit of them and their families, freed of all claims, tax and otherwise, and the release of the power on May 1, 1937, falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934." (R. 124.)

**(c) The Gifts Were Complete and Absolute as the Law Was Construed When the Trusts Were Created.**

At the time the trusts were created in June, 1925, and enlarged in August, 1934, the Bar generally, the settlor and his law firm held the view that a trust instrument embracing the terms set out in the Spalding trusts conveyed absolute and complete title.

Under the rule announced in *Reinecke, Collector v. Northern Trust Co.*, 278 U. S. 339, the reservation of such powers did not diminish the absolute and unqualified nature of the transfer.

> "Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

The Board of Tax Appeals accepted the rule announced in *Reinecke, Collector v. Northern Trust Company,** *supra*, as controlling under the later Revenue Acts as did the Circuit Courts of Appeals.

In *City Bank & Farmers Trust Co. v. Commissioner*, 296 U. S. 85, trusts such as settlor's trusts were held not to convey completed gifts; such transfers became complete and absolute only upon the relinquishment of the powers.

It is admitted and the Trial Court found the facts to be that the settlor executed the original transfer under a misapprehension as to the legal effect of the trust instrument and that when the trusts were established settlor intended to make absolute and completed gifts to his children and that he believed the form of conveyance used by him accomplished that purpose. Settlor remained under that mistaken view until the decision in the *City Bank and*

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*City Bank & Farmers Trust Co., Trustee, v. Commissioner, 29 B. T. A. 1141, 1144 (Feb. 21, 1934); affirmed.

*Farmers Trust Co. v. Commissioner, supra,* was brought to his attention. Immediately thereafter settlor amended the trust instrument to carry out his original intention, that is, to make the gifts absolute and complete to his children and grandchildren, as he thought he had already done.

Respondents conceded that a second gift tax became due when the power was released, although when the transfers were originally made a gift tax was paid by the settlor upon their full value.

Under these and other facts in the record the District Court found the case to be one in which the Settlor, motivated solely by a desire to help his children, made what he thought and intended to be absolute and completed gifts to them and thereafter finding that because of a change in the decisional law settlor had misapprehended the legal effect of the instrument, he amended the instrument to speak his original intention. The District Court found the facts to be:

> "8. The gifts of June 15, 1925, and August 26, 1934, were made by Mr. Spalding to meet the pressing necessities of some of his children and to equalize the gift to others and out of the desire to relieve the needs and to make secure the maintenance of his children and the education and support of his grandchildren. The gifts were put in trust and not delivered to the children because of past experience in handling prior gifts. Suzanne and Jack had lost such gifts in unsuccessful business enterprises, and Mr. Spalding, in establishing the trusts, desired to protect them against their own business misadventures and not to retain any benefit, directly or indirectly, to himself.
>
> "9. At the time the trusts were created in June 1925 and enlarged in August 1934, Mr. Spalding believed that the gifts were complete and absolute and so intended, and that the trust property passed absolutely out of him for all purposes, including estate

taxes. Under the law as he then interpreted it, he was justified in that belief. He returned and paid gift tax upon the full value of the gifts in 1925 and 1934, and his intentions and purposes were to make the gifts absolute and complete." (R. 123.)

* * *

"12. Mr. Spalding made the releases of May 1, 1937 for the purpose of putting the trusts in the condition, which he had thought they were in when made, so that they would not be a part of his estate for estate tax purposes. However, in making such releases Mr. Spalding was actuated by the thought of death only to the extent that thoughtful men habitually act with regard to ultimate death, and he did not in 1925, 1934, and 1937 entertain thoughts of death except the general expectation of death that all entertain.

"13. He was motivated in making the gifts by his desire to meet the necessities of his children and to set aside property solely for the benefit of them and their families, freed of all claims, tax and otherwise, and the release of the power on May 1, 1937, falls within the scope of the purpose and motive he had in making the gifts in 1925 and 1934." (R. 123, 124.)

The facts as found by the Trial Court were expressly approved by the Circuit Court of Appeals upon a review of the Record. (R. 132.)

In the case at Bar, the Trial Court, in testing whether or not the transfer was made "in contemplation of death", gave consideration to the facts and circumstances under which the trust was created as well as the facts and circumstances under which the power was surrendered, and in determining Settlor's motive in making the gift viewed the creation of the trust and the surrendering of the power as several steps of an "integrated transaction" and not as several independent and unrelated transactions.

In treating the several steps—creation of the trust and the renunciation of the power—as an "integrated transaction", the Trial Court in the case at Bar acted with the approval and perhaps under the command of this Court in the recent case of *Dobson v. Commissioner*, 320 U. S. 489, 493, 502, 503.

The Tax Court in that case treated a series of transactions occurring over a period of years as an "integrated transaction" in determining tax liability, and so treating them reached the conclusion of no tax liability. The Circuit Court of Appeals reversed the Tax Court, holding that that Court was unauthorized to treat the several steps in the transaction as an "integrated transaction" and held that each step in the transaction should be looked at as a separate unit. So viewing the evidence, the Circuit Court of Appeals reached a different result from the Tax Court and found tax liability. This Court upheld the power of the Tax Court in determining the question of fact to treat the transaction as an "integrated transaction" in determining the question of liability. The underlying theory of this Court's decision is found in a series of very pointed statements, to-wit:

> "The Tax Court's inquiry as to past years was authorized if 'necessary correctly to redetermine' the deficiency. The Tax Court thought in this case that it was necessary; the Court of Appeals apparently thought it was not." (P. 493.)
>
> • • •
>
> "Whether an apparently integrated transaction shall be broken up into several separate steps and whether what apparently are several steps shall be synthesized into one whole transaction is frequently a necessary determination in deciding tax consequences." (P. 502.)
>
> • • •
>
> "The Tax Court analyzed the basis of the litigation which produced the recovery in this case and the

obvious fact that 'regarding the series of transactions as a whole it is apparent that no gain was actually realized.'" (P. 503.)

• • •

"The error of the court below consisted of treating as a rule of law what we think is only a question of proper accounting." (Pp. 506-7.)

The method of the Trial Court in determining the evidence in the case at Bar not only finds support in the Dobson case but among the Circuits. In determining the question of motive, the Courts have considered the facts surrounding the inception of the gift as well as its consummation.

In *Denniston v. Commissioner*, 106 F. (2d) 925, the Court looked to the motive of the settlor in creating the trust, as well as the circumstances under which the transfer was consummated by the renunciation of the power, in determining whether the transfer was made "in contemplation of death."

In *Bradley v. Smith*, 114 F. (2d) 161 (C. C. A. 7, 1940), the Court looked at decedent's prior plan to test the question as to whether the transfer was made "in contemplation of death."

Likewise, in *Brown v. Commissioner*, 74 F. (2d) 281, (C. C. A. 10, 1934), the Court said:

"Since the motive for the gift dates back of the time it was consummated, the circumstances" of the consummation "are not so important • • •."

The Courts are fully agreed that transfers "in contemplation of death" present a question of fact for decision.

This Court, in *United States v. Wells*, 283 U. S. 102, 119, said:

"It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in 'contemplation of death', as there

can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances."

In *McCaughn v. Real Estate Company*, 297 U. S. 606, the District Court, sitting without a jury as in the case at Bar, found that the transfer was made "in contemplation of death."

The Circuit Court of Appeals, upon a careful review of the evidence, held to the contrary and reversed the District Court.

According to this Court, the only question that the reviewing Court could pass upon was "whether the Court's verdict was wholly without evidence to sustain it."

In reversing the Circuit Court of Appeals, this Court bluntly said:

> "The ultimate question for the decision of the Trial Court was one of fact and its general verdict was conclusive." (P. 608.)

The question of whether or not a transfer is made "in contemplation of death" is tested by settlor's state of mind. In *United States v. Wells*, U. S. 102, 117, 118, the rule is stated thus:

> "As the transfer may otherwise have all the indicia of a valid gift inter vivos, the differentiating factor must be found in the transferor's motive • • •. The question necessarily is as to the state of mind of the donor."

In this case, when the change in the decisional law was brought to settlor's attention, he did the thing and only thing that could effectuate his original purpose. He corrected the instrument. His state of mind had not changed in the meanwhile; his motive had not changed one iota. His motive originally was to protect his children by making a completed gift to them. It is conceded that he had a right to do that. In amending the instrument so as to give to it

the same legal effect he had intended it should have originally, settlor had no new or different motive or state of mind. The Trial Court so found.

As a matter of fact every completed gift *inter vivos* reduces the estate tax and incurs a lesser gift tax. The Congress so intended.

Every intelligent settlor will want to know the tax consequences of his transfer and is entitled to seek advice on that subject. Every careful lawyer will draw the conveyance, if consistent with settlor's purpose, in such manner as to avoid the estate tax on the property. If a lawyer should later discover his advice or draftsmanship was in error, he would so advise his client. If petitioner's position is sustained in this case, then if the client corrected the legal error, the transfer would thereafter be characterized as a testamentary disposition of property, notwithstanding the fact that the client was motivated solely by a desire in making the transfer to help his needy children and intended at the time to make a completed gift.

The Trial Court held that settlor, being motivated entirely by the "beneficent" purpose to help his needy children, had a right to choose the form of instrument that would avoid estate taxes and incur a gift tax and later when he discovered that he misconceived the legal effect of the instrument, he had a right to make the necessary corrections without changing the essential nature of the transaction.

In making the change, according to the Trial Court, settlor was not motivated by thoughts of death in surrendering the power but was "motivated by what he considered a change in the law * * *." (R. 118.)

In other words, the thing that motivated the release was the fact that settlor discovered that the legal effect of the transfer was different from what he thought it was at the time it was executed.

In making that correction settlor was not looking forward to death—he was looking backward to an incompleted

life transaction. Except for the fact that the life transaction was incompleted contrary to his expectation, he would not have relinquished the power.

The consequences of the original transfer, if the law had been as settlor thought it was, would have defeated death duties, yet it is admitted that the motive for making the transfer was related entirely to a "beneficent" life motive. His relinquishment of the power, as far as his motive was concerned, is in exactly the same position tax-wise as if in the first instance the transfer had conveyed a completed gift as he intended. That, at least, is the view of both courts below.

Under petitioner's argument, if the settlor had executed the trust on June 15, as he did, and the change in the decisional law had occurred the next day on June 16, and immediately thereafter the settlor had corrected the legal infirmity in the instrument by releasing the power, such relinquishment would have been a transfer "in contemplation of death" regardless of the motive in making the transfer or the settlor's intention to make a completed gift originally.

Under the facts found by the Trial Court in respect to the original motive of settlor and the condition of his health, it seems unreasonable that such a result would follow. Then how can it follow when he does precisely the same thing for precisely the same reason several years later under circumstances in which the Court finds that settlor is actuated by a desire to make the instrument conform to his original intentions? At any rate both Courts below refuse to be a party to such a grotesque and oppressive result.

It has never been the policy of the Congress or the Courts to penalize the correction of errors. In many instances in which the hardship results from statutory barriers, Congress has intervened through legislation and the Courts through judicial decision.

No statutory relief is needed in the case at Bar. Petitioner was free to correct his own error.

Petitioner's argument leads far in all directions and if followed will thwart the will of the Congress. The Congress intended to encourage parents to divide their holdings with their children when such children are in need. With that in view, the Congress made the gift tax rate less than the estate tax rate. The information that these tax rates are different is a matter of general knowledge, and the Congress must have assumed that to be true. The Congress did not intend to subject a transfer to the gift tax and then to an estate tax, where the gift was made for a proper and beneficent purpose. The Congress assumed that when the purpose of the gift was proper that the donor would select the method incurring the lesser of the two taxes. The argument of petitioner leads to the conclusion that a conscious knowledge of the tax saving makes the gift as a matter of law "in contemplation of death" regardless of the circumstances under which the gift was made, and regardless of the inducing life motive of the donor in making the gift. Under petitioner's argument, the gift is in contemplation of death even though the compelling and inducing motive is the desire of settlor to assist his needy children, and he purposely and intentionally adopted the method that will lessen rather than to enlarge his tax, and even though the tax purpose is collateral and incidental and in no sense is an inducing motive to make the gift.

If that is petitioner's position, then all gifts inter vivos are in jeopardy, and the clear and wholesome purposes of Congress are defeated.

If petitioner's argument does not go that far, then it follows that proof of the tax purpose is not conclusive, that a gift or release of a power is "made in contemplation of death" and that that purpose must be looked at in the light of all other relevant factors.

The defect in petitioner's argument consists in the fact that the desire to lessen taxes is merely an evidentiary fact

that must be considered along with other relevant facts in determining whether or not the settlor was in that state of mind that falls within the statutory term "in contemplation of death." Petitioner's argument fails to recognize that the weight of proof of the tax purpose depends upon the relative importance of other relevant factors. Petitioner's argument fails to recognize that under one set of circumstances the proof of the tax purpose may be controlling when under another set it may have little if any weight. Petitioner seeks an adjudication by this Court to the effect that the proof of the tax purpose, regardless of how incidental or collateral that purpose may be to the transaction, is tantamount to proof of contemplation of death. In this position, petitioner goes far beyond the authorities cited and relied upon. In *Kroger v. Commissioner*, 145 F. (2d) 901, relied on by petitioner, the transfer was held to be in contemplation of death, although the Court expressly found that the transfer was not dictated by tax motive, and that the settlors were in good health. The case illustrates the fact that the tax motive is merely one of many evidentiary facts which should be considered by the trior in determining the ultimate factual question of whether the transfer is "in contemplation of death."

## PETITIONER'S POSITION NOT SUSTAINED BY AUTHORITIES.

Petitioner seeks reversal of the case at bar, although the question involved is a factual one, upon the authority of *Farmers Loan & Trust Company v. Bowers*, 68 F. (2d) 916, 98 F. (2d) 794, and *First Trust & Deposit Company v. Shaughnessy*, 134 F. (2d) 940. Petitioner also contends that *Denniston v. Commissioner*, 106 F. (2d) 925 (C. C. A. 3d) is overruled by *Commonwealth Trust Company of Pittsburgh v. Driscoll*, 137 F. (2d) 653 (C. C. A. 3d). Petitioner's position regarding all of these cases overlooks the difference in the factual basis upon which the several cases were decided.

In order to determine how far all or any of those cases are helpful or controlling, it is necessary to look at the controlling facts in each case.

When *Farmers Loan & Trust Company v. Bowers*, 68 F. (2d) 917, was first before the Court, the controlling facts were set out in great detail and that case cannot be properly understood unless the facts are carefully examined.

The *Bowers case, supra*, is the foundation for petitioner's argument, and in every material point the facts in the *Bowers case, supra*, and the case at bar differ.

In the *Bowers* case, Mr. Astor, the settlor, had no "beneficent" life motive. In the case at bar, Mr. Spalding, the settlor, made the transfer to assist his children who were in financial need—a "beneficent" life motive.

In the *Bowers* case, Mr. Astor, the settlor, transferred practically all of his remaining wealth to his children, amounting to some forty-six million dollars. Within a few years prior to that transfer, he had made gifts to his children to the extent of some forty-seven million dollars. In the case at bar, Mr. Spalding, the settlor, made gifts to his children in moderate amounts and in each instance the amount of the gift was measured by the financial need of the child at the time the gift was made.

In the *Bowers* case, Mr. Astor reserved a life annuity of $150,000 for himself; in the case at bar, Mr. Spalding reserved nothing to himself.

In the *Bowers* case, the bulk of Mr. Astor's remaining fortune was involved in the transfers; in the case at bar, the bulk of Mr. Spalding's fortune was retained in his estate and was subject to estate taxes.

In the *Bowers* case, Mr. Astor, the settlor, was not in good health, was suffering from a serious disease, and was under the constant care of physicians; in the case at bar, Mr. Spalding, the settlor, was in excellent health, was actively engaged in charitable, civic, and political affairs and was traveling thousands of miles in his automobile.

In the *Bowers* case, a substantial inducing motive with Mr. Astor, the settlor, was to evade estate taxes. In the case at bar, the inducing motive of Mr. Spalding, the settlor, to make the transfer was the desire to aid his children who were in financial distress, and at the same time the transfer was made, he intended to make to his children absolute and completed gifts. His motive in making the release and surrendering the power was to give that legal effect to the instrument originally intended.

In the *Bowers* case, the transfer was made by Mr. Astor, the settlor, as a substitute for his will, and his attorney wrote "His idea is to anticipate the provisions of his will, to some extent . . .."

In the *Bowers* case, the plantiff in an attempt to overcome the presumption in favor of the assessment relied on proof that other inducing motives to make the transfer aside from the escape of death duties was the desire to lessen the income taxes and escape a possible capital levy; in the case at bar, the plaintiff to overcome presumption in favor of the assessment relied on the "beneficent" life motive of settlor to help his children, his good health, and that in amending the transfer he gave to the instrument the legal effect he originally intended and thought it already had.

In the *Bowers* case, all the facts enumerated above were considered relevant by the Court and were given weight in determining whether the transfer was a substitute for testamentary disposition; in the case at bar, likewise all the facts enumerated above were considered by the Trial Court to determine whether the transfer should be considered as a testamentary disposition. Under these different and distinguishing facts, petitioner is undertaking to have this Court to hold as a matter of law that the Trial Court in the case at bar must find the same verdict as was found by the jury in the *Bowers* case. Petitioner would take away from the Trial Court, sitting as a jury in the

case at bar, the right to determine the factual question involved upon the basis of the facts in that particular case.

*First Trust & Deposit Company v. Shaughnessy,* 134 F. (2d) 940, 942, relied on by petitioner, is likewise distinguishable upon the facts. In this case, the Court held that the transfer was a substitute for testamentary disposition. According to the Court, "This would have been equally true if Ballard had lived for fifteen years; it would have been equally true if he had not intended to avoid estate tax. He would have given her property which he intended to be unavailable for any beneficial purpose until after his death and to become the equivalent of a bequest thereafter."

The transfer in that case involved life insurance policies which were realizable and distributable after settlor's death. The Court's decision was grounded upon the fact that the transfer was not motivated by any beneficent life purpose, and that the benefits of the transfer were realizable only after death. The transfer was motivated by a desire to evade taxes.

Petitioner contends that *Denniston v. Commissioner,* 106 F. (2d) 925 is in conflict with *Farmers Loan & Trust Co. v. Bowers,* 68 F. (2d) 916, (98 F. (2d) 794) and is overruled by *Commonwealth Trust Company of Pittsburgh v. Driscoll,* 137 F. (2d) 653. All of these cases are grounded upon the decision of this Court in *United States v. Wells,* 283 U. S. 102.

The *Denniston case, supra,* is not in conflict with the *Bowers* case nor is it overruled by the *Driscoll* case. The difference in the cases is not found in any statement of the law but in the relative weight that was given to facts under varying circumstances.

In the *Denniston* case the settlor released a power in 1932 that she had retained in a revocable trust created in 1915. The Board of Tax Appeals reached the conclusion that the relinquishment of the power was made "in contemplation of death" because the dominant and controlling

motive for the relinquishment was the decedent's desire to save her estate the burden of death taxes.

In reversing the Board, the Court said:

> "We think that the petitioners adequately overcame the presumption in favor of the Commissioner's ruling by the uncontradicted evidence that the policy of the deceased was to divide her estate equally among her children as is shown by the trust deed executed by her nineteen years prior to her death; that at the time of the 1932 transfers she was a vigorous, robust woman with better than average health for one of her age; and that she was planning her activities for the future without any fear of failing health or impending death."

The Court rests its decision in that case upon two facts that were given no weight by the Board and the Commissioners: (1) that many years prior to the release of the power the decedent had indicated her intention to divide her property among her children by the execution of the deed of trust on May 19, 1915; and, (2) that at the time she released the power she was 'in reasonably good health for one of her age.'

The release of the power in the *Denniston case, supra*, was the consummation of settlor's original intention to make a gift to her children prior to her death. That purpose constituted a "beneficent" life motive. In view of that life motive and the good health of the decedent, the Circuit Court of Appeals reached the conclusion that the donor could use "a method which she thinks is best calculated to save death taxes" and "not thereby conclusively stamp" the transaction as "in contemplation of death."

The original donative motive, although it was manifest by acts that had occurred many years before, together with the good health of the settlor, stamped the transaction in the opinion of the Circuit Court of Appeals as not "a substitute for a testamentary disposition."

In the *Bowers case, supra,* no "beneficent" motive existed. The lack of that motive constituted a controlling factor in the eyes of the Court. As was said by the Court when the case was first before it: *Farmers Loan & Trust Co. v. Bowers,* 68 F. (2d) 916, 923, 924:

> "In the case of such a gift *inter vivos,* specific motives, such as generosity or a desire to see children independent are present and sufficient to actuate the donor. To characterize a gift as such, it is not necessary that there may be any reference to the contemplation of continued life. Indeed the donor may not think about continued life but may assume it *.* *. But in the case of a testamentary disposition, including gifts in contemplation of death, the psychological or mental state of one disposing of property is entirely different from that of one making an inter vivos gift."

In the *Denniston case, supra,* the Court found a life motive to exist for making the gift, whereas in the *Bowers* case the Court held that the gift was without a "beneficent" life motive.

Under these varying facts the Court in the *Denniston* case concluded that the mental state of the one making the gift was that of a person desiring to make an "*inter vivos* gift", whereas in the *Bowers case, supra,* the Court held that the mental state of the testator was that of one desiring to make "a testamentary disposition" of his property. Both conclusions were based on substantial evidence.

In the *Denniston case, supra,* the Court looked to the prior plan of the settlor in testing the question as to whether the particular act was done "in contemplation of death." But when the life motive is the inducing motive for the transfer, the settlor can adopt the method that will lessen taxes. Nothing in the *Bowers* case is to the contrary and the implications of the decision in the *Bowers* case support the *Denniston* case. In fact, it is a general rule that where the transaction is otherwise permissible, the tax-

payer can choose the method to lessen taxes, without thereby generating a tax. *Chisholm v. Commissioner*, 79 F. (2) 14; *Gregory v. Helvering*, 293 U. S. 465, 469.

In *Commonwealth Trust Company of Pittsburgh v. Driscoll*, 50 F. Supp. 949, 950, 951 (affirmed on the opinion below 137 F. (2) 653) the transfer was lacking in a life motive. The Court said:

> "There is no evidence as to the reason these transfers were made to the decedent's wife. * * * At no time did he discuss with business associates or relatives, so far as the evidence in this case shows, the reason or motive for making the transfer of this real estate from himself and his wife as tenants by entirety to his wife alone."

In that case, plaintiff contended that the life motive consisted of the family tradition that the title to the family homestead be held by the wife. The Trial Court found expressly against that contention.

The assessment had the presumption of correctness and the Trial Court held "that burden the plaintiff has failed to sustain." In that case the settlor was in good health but eighty years old at the time of the transfer.

That case comes to this: that the finding by the Trial Court that plaintiff had failed to carry the burden will not be disturbed where the settlor was eighty years old, in good health and made the transfer without proof of any life motive and the life motive attributed to the transfer turned out to be false. The absence of proof of the life motive in the *Driscoll case, supra*, justified the finding by the Trial Court that plaintiff had failed to sustain the burden. That case does not conflict with the *Denniston case, supra*, where a "beneficent" life motive was expressly found.

All the cases turn on the interpretation of different facts under varying circumstances, or the different weight given to the same facts where other relevant associated facts vary. The effort of petitioner is to deny to the triors

of the facts the right to determine in particular case their relative weight or value.

The proposition that the same fact may have more or less weight, depending upon other relevant associated facts, is recognized in all the decisions. The tax motive may or may not be evidence that the gift was made in contemplation of death, just as any other factors may or may not be evidence of that fact, in determining the ultimate question. *Farmers Loan & Trust Company v. Bowers*, 98 F. (2d) 794, 798, 799. Under some circumstances, it may be controlling evidence of the ultimate facts. In other circumstances, it is entitled to little or no weight in determining the ultimate facts. In some instances the inducing motive to make the transfer is due entirely to a "beneficent" life motive, yet settlor may intelligently select a method that will escape estate taxes. Under such circumstances, the tax purpose is collateral and is without any or slight evidentiary significance in determining the ultimate question.

In other instances, the motive of escaping taxes may be a sufficient evidentiary fact to be controlling in determining the ultimate fact.

The function of weighing the evidentiary facts in the particular setting in order to reach the ultimate factual decision rests upon the Trial Court or the jury, as the case may be, and should not be usurped by the reviewing Court.

## CONCLUSION.

While the legal effect of the relinquishment of the power was to take the trust property out of the estate of settlor, yet that was also the effect of the original instrument as drawn under the law as then interpreted. The Congress intends that parents help their children by making gifts to them to relieve their necessities, and encourages parents to do so by fixing the Gift Tax Rate just three-fourths of the Estate Tax Rate. Petitioner seeks a judicial construction of the statute, that defeats the will of the Congress, and that leads to the conclusion that every

relinquishment of a power in a trust as a matter of law is "in contemplation of death" because the inevitable legal result of the relinquishment is to defeat the estate tax. If the Congress had so intended, the Congress would have said so in plain language.

The problem simplifies when it is recalled that the motive to escape death duties is merely one of many evidentiary facts, which must be weighed by the Trial Court in determining the ultimate question of whether the transfer was in fact motivated by donative intent or by desire to make a substitute for a testamentary disposition. Paraphrasing the language in the *Dobson case, supra*, "The error of petitioner consists in treating as a rule of law what we think is only a question of fact."

Respectfully submitted,

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Of Counsel:

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p. 5

# SUPREME COURT OF THE UNITED STATES.

No. 289.—October Term, 1945.

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| Marion H. Allen, Collector of Internal Revenue, Petitioner, *vs.* Trust Company of Georgia and Hughes Spalding, Executors of the Estate of Jack J. Spalding, Deceased. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[January 28, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

The decedent, Jack J. Spalding, died December 8, 1938, at the age of 82. In 1925 he established two spendthrift trusts—one for his daughter Suzanne and one for his son Jack—and transferred to each trust securities of the value of $50,000. In 1934 he added securities to each trust. He paid gift taxes on these transfers. When he died, the Commissioner included the corpus of each trust in his estate and collected the estate tax on it. The executors brought this suit for a refund. The District Court found that the trusts were established under the following circumstances.

Suzanne and her husband, before 1925, had engaged in a business venture which had ended in disaster. Both had lost all their property and were heavily indebted. Suzanne's husband was without means to support her and their five children. Jack likewise had engaged in an unsuccessful business venture. He was not earning enough to support his family. The gifts were made by the decedent to relieve the needs and to make secure the maintenance of his children and the education and support of his grandchildren. The gifts were placed in trust because Suzanne and Jack had lost prior gifts in unsuccessful projects. The decedent desired to protect them against their own business misadventures and not to retain any benefit, directly or indirectly, to himself. He made the gifts to meet their necessities and desired to set aside the trust property, freed from all claims, tax or otherwise. The decedent, however, retained under the trusts a power to amend

with the consent of the trustee and beneficiary.[1] At the time the trusts were established in 1925 and enlarged in 1934 he believed that the gifts were complete and absolute and intended them to be such. He was a lawyer and believed that under the federal law the reservation of such a power to amend would not require the inclusion in his gross estate at his death of the value of the corpus of each trust. But in 1935 *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, was decided, holding that the reservation of a power to amend brought the corpus of the trust into the settlor's estate, even though the power could not be exercised by the settlor alone. Upon being advised in 1937 that the gifts remained a part of his estate for estate tax purposes, decedent executed an instrument renouncing the power to amend the trusts. This was done so that the trusts would not be a part of his estate for estate tax purposes. At that time, as well as in 1925 and 1934, the decedent was in average good health for a man of his age. He released the power to amend so as to put the trusts in the condition he had thought they were in when he made them. The release was designed to carry out his original purpose in setting aside the property freed from all claims, tax or otherwise. In 1925, 1934, and 1937, he did not entertain thoughts of death except the general expectation of death that all entertain.

The District Court concluded that neither the establishment or the enlargement of the trusts, nor the release of the power to amend was made in contemplation of death. Accordingly, it rendered judgment for respondents. 55 F. Supp. 269. The Circuit Court of Appeals sustained the findings of the District Court and affirmed the judgment. 149 F. 2d 120. The case is here on a petition for a writ of certiorari which we granted because of an apparent conflict between that decision and cases from other circuits.[2]

[1] "During my life, by the unanimous consent of the said trustee, my said daughter [son] and of myself, the terms of this agreement may be amended, changed, enlarged or limited, but in no event shall the conveyance of said stock to the party of the second part be revoked."

[2] Cf. Farmers' Loan & Trust Co. v. Bowers, 68 F. 2d 916; Farmers' Loan & Trust Co. v. Bowers, 98 F. 2d 794; First Trust & Deposit Co. v. Shaughnessy, 134 F. 2d 940; Commonwealth Trust Co. v. Driscoll, 50 F. Supp. 949, aff'd 137 F. 2d 653. And see Pavenstedt, Taxation of Transfers in Contemplation of Death, 54 Yale L. Journ. 70; Harriss, Gift Taxation in the United States (1940) ch. II.

It is clear that the corpus of each trust was properly included in decedent's gross estate if he released the power to amend in contemplation of his death.[3] And there is a presumption that he did so because the release was made less than two years before his death.[4]

It was said in *United States* v. *Wells*, 283 U. S. 102, 117, that a gift is made in contemplation of death within the meaning of the estate tax law if "the motive which induces" it is "of the sort which leads to testamentary disposition." Petitioner's argument is that a purpose to avoid the estate tax is such a motive. It is a motive which would cause a decedent to make an *inter vivos* transfer rather than a will. Since the purpose of the contempla-

[3] Sec. 302(d)(1) of the Revenue Act of 1926, 44 Stat. 9, as amended by § 401 of the Revenue Act of 1934, 48 Stat. 680, reads as follows:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(d)(1) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Article 16 of Treasury Regulations 80 (1937 ed.) as amended by T. D. 4966, 1940-1 Cum. Bull. 220, provides in part:

"The phrase 'contemplation of death,' as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition."

[4] Sec. 302(d)(3) provides:

"The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

tion of death provision was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (*United States* v. *Wells, supra,* pp. 116-117), the statute is satisfied, it is said, where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution.

That is a correct statement of the governing principle for it presumes the existence of the requisite motive. The transfer is made in contemplation of death if the thought of death is the "impelling cause of the transfer." *City Bank Farmers Trust Co.* v. *McGowan,* 323 U. S. 594, 599. The transfer may be so motivated, even though the decedent had no idea that he was about to die. *United States* v. *Wells, supra,* pp. 117-118. On the other hand, every man making a gift knows that what he gives away today will not be included in his estate when he dies. All such gifts plainly are not made in contemplation of death in the statutory sense. Many gifts, even to those who are the natural and appropriate objects of the donor's bounty, are motivated by "purposes associated with life, rather than with the distribution of property in anticipation of death." *United States* v. *Wells, supra,* p. 118. Those motives cover a wide range. See 1 Paul, Federal Estate & Gift Taxation (1942) §§ 6.09 *et seq.* "There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death." *United States* v. *Wells, supra,* p. 119. Whether such a desire was the dominant, controlling or impelling motive is a question of fact in each case. We do not have here the type of problem presented in *McCaughn* v. *Real Estate Land T. & T. Co.,* 297 U. S. 606, where the appellate court undertook to reverse the trial court on a review of the evidence. Here two courts have resolved that question of fact in favor of respondents. They have found, as we have said, that Mr. Spalding established the trusts to meet the necessities of his children by giving them property, freed of all claims, tax or otherwise; and that in 1937 he released the power to amend to accomplish the purpose which he originally had, but which he later discovered had not been achieved. Those findings are sufficient to oversome the statutory presumption that the gifts, being made within two years of Mr. Spalding's death, were made in contemplation of death. Those findings, being concurrent find-

ings of the two lower courts, will be accepted here without re-examination of the evidence. See *United States* v. *O'Donnell*, 303 U. S. 501, 508, and cases cited.

It is said, however, that those findings rest on a misconception of the law, since admittedly the decedent in 1937 released the power to amend so as to avoid paying an estate tax on the property included under the trusts. But that is to isolate the release from all that preceded and to treat it as a wholly independent transaction. This is not a case where a settlor, having made one plan for the disposition of his property, later makes a different one to avoid death taxes. Mr. Spalding, in making the release, did what he originally intended to do—to make complete and absolute gifts to his children, freed of all claims, including taxes. Retention of the power to amend would have brought the trust property into Mr. Spalding's estate and subjected it to the estate tax lien.[5] His purpose to take care of his children, come what may, might thus have been thwarted or impaired. He guessed wrong on the law, when he retained the power to amend. When he rectified the error, he was in good faith, endeavoring to complete his original project, not to give his children more than he at first intended in order to save taxes. What he did in 1937 was merely to accomplish by an additional step what he assumed he had already done. The findings make plain that the establishment of the trusts in 1925, their enlargement in 1934, and the release of the power to amend in 1937 were parts of one integrated transaction. That is a finding of fact which we are not at liberty to disturb on this record. On these facts, his desire to avoid death taxes does no more than establish that he did not want his plan to underwrite the necessities of his children and grandchildren jeopardized. His desire to make adequate provision for them remained the dominant motive, or so the triers of fact could properly find.

*Affirmed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[5] See Int. Rev. Code § 2058, 53 Stat. 128; 26 U. S. C. § 827. It was held in Higley v. Commissioner, 69 F. 2d 160, that the personal liability of transferees did not extend to the beneficiaries under a trust.

827